SUBJECT INDEX.

Supreme Court of the United States.

THE STATE OF OHIO, ex rel DAVID DAVIS,
Plaintiff in Error,

No. 987. *vs.*

CHARLES Q. HILDEBRANT, Secretary of State, et al,
Defendants in Error.

Reply Brief.

Defendant's brief reached us May 23, 1916, a day after this case was submitted to this court pursuant to its direction.

It contains nothing specially new, hence we only note what we deem and have shown to be patent fallacies. No new authority is cited.

On p. 4 it is asserted that Section 4, Article I, Constitution of the United States, refers to the legislative power of the State as fixed by the State Constitution." This is only true provided the "legislative power" is "*the Legislature thereof.*" And Ohio's Constitution states (Sec. 1, Art. II) that:

"The legislative power of the State shall be vested in a General Assembly consisting of a Senate and House of Representatives."

We have shown its enactments become laws without referendum approval.

Brief, pp. 55-56.
Secs. 1*c* and 16, Art. II, Con. of Ohio.

Counsel rests his contention largely on the claim that Congress possesses the power, notwithstanding the Federal Constitution to the contrary, to authorize States to make redistricting laws for Representatives in Congress otherwise than by their Legislatures. Ohio has but one Legislature, and it passed the law in question without any referendum participation; and it can pass no law with referendum, participating; and referendum is not required to approve a law of the Legislature, before it goes into effect. If referendum, acting independently of the Legislature can pass a redistricting law which may go into effect, it has not done so in Ohio; and it would not be an act of the Legislature.

Brief, pp. 16, 57, 58.

Nor does an Ohio referendum law go into effect on the approval of the Legislature. Counsel (pp. 10, 16, 28), talk much about the Act of Congress (Aug. 8, 1911), and say that Legislatures must act by law, etc. Of course they do, and unrestrained by any outside agency or referendum veto power.

As to the Governor's right to veto a districting law for Congress it will be met when the question arises.

See authorities, Brief, p. 56.

Under the head of "*Argument*" (p. 8) counsel attempts to deny that Section 4, Article I, Federal Constitution, means what it says, and he says, "the authority is given to the legislative body as a body," etc.

Granted; this excludes any outside agency; certainly such rejecting outside agency as referendum is, in no possible sense, a part of the Legislature. Counsel (same p.) say, Sec. 2, Art. I, Con. U. S. "refers to the most numerous branch of the State Legislature," and he pretends to find authority showing the framers of the Constitution did not know that Legislatures had, at some time, consisted of less than two bodies; that the "Continental Congress consisted of but one body," etc.

The Constitution of the United States was adopted to get rid of all one-body Legislatures, Continental Congress included.

This Section 2 conclusively shows the framers of the Constitution only recognized and regarded two-body Legislatures. We have shown that such Legislatures were existing or regarded as existing in all the States when the Constitution was adopted.

Brief, pp. 40-1, 49.
Pac. Tel. Co. v. *Oregon*, 223 U. S. (125).

But, suppose a one-body Legislature was authorized by Section 4, Art. II, Constitution of the United States, to prescribe Congressional districts, was it void, and did it leave referendum—no Legislature or legislative body at all—the right to veto any law passed by any kind of a Legislature or legislative body?

The argument is far fetched (p. 10) that because Congress (1787), before the Constitution of the United States was adopted, provided a Legislature for the Territory North West of the River Ohio, consisting of a "governor,

legislative council and a house of representatives" that said Sec. 4 must be held to include referendum, then unknown, or *anything* else than a State Legislature. But this territorial Legislature consisted of *two bodies*; and elsewhere in the ordinance the governor is shown not to be a legislator, but a governor with veto power.

Counsel say (p. 12):

> "Sec. 4 of Art. I * * * refers to the power in the State which exercises the function of legislation."

This need not be disputed, but such "power in the State" does not include an outside rejecting agency which had nothing to do with exercising *"the function of legislation."*

The 26 South Dakota case counsel say (p. 12), "is really in point," though it holds (pp. 8, 9):

> "no power to divide the State into congressional districts was ever delegated to the Legislature by Sec. 4, Art. I, of the Federal Constitution," * * * or "to the State itself to regulate such elections," etc.

We have sufficiently considered that case.

Brief, p. 37.

The claim (p. 13) that constitutions, "in the main," only lay down "broad general principles," if sound, can have no application to plenary mandatory provisions specifically conferring *power*.

That said Section 4 confers the only power State Legislatures possess for prescribing "times, places and the manner" of electing representatives to Congress is plain, and the authorities in this court and other courts, and congressional precedents uniformly so hold.

Brief, pp. 19-36, 56-7, 62-70.

Counsel again (p. 15) recur to the 1911 apportionment act, repeating the claim that it supersedes the Constitution of the United States as to the right and powers of Legislatures, and gives the right to States to otherwise pass redistricting laws, such right being conferred by the use in the act of the words:

> *"In the manner provided by the laws thereof."*

There was not in 1911, before or since that date, any law of Ohio providing "by the laws thereof" the *"manner"* of electing representatives in Congress. And Congress never possessed any power to confer on State Legislatures any authority to district a State for representatives in any manner.

We have fully discussed this 1911 apportionment Act; also made clear, we think on the highest authority, that Congress can not provide the manner State Legislatures may prescribe the "times, places and manner" of electing representatives in Congress, but must itself, by law, prescribe, if not satisfied with the acts of legislatures.

See Brief, pp. 62-73.

And this view renders it unnecessary here to comment on a large part of counsel's brief (pp. 15-24), made up of loose, inconsiderate remarks, found in the Congressional Record, to the effect that by striking out the word *"Legislature"* in the apportionment act, and using the language, as to the manner of redistricting States, put in it, the provision of the Constitution of the United States, would be anuulled, and any other agency might become operative. We have said something on this subject.

Brief, pp. 28-91, 64-71.

That *referendum* is not republican in form we have sufficiently pointed out, we think.

Brief, pp. 39-53.

Finally, counsel (pp. 24-25) modestly suggest the Ohio court should be reversed in holding (syl. 4, R., 20), that this case was justiciable. He, however, cites some of the case we have cited in our Brief (pp. 50-3), holding it *is* justiciable.

The 146 U. S. (p. 1) case, is squarely in point and, with others, never overruled.

The Oregon case (223 U. S., 118), was against a State alone, and Chief Justice White clearly distinguished it from a case involving individual rights.

The State case (128 Ky., 363), does not hold the matter of requiring official boards relating to elections non-justiciable. It holds, the principle we contend for here, that the Legislature of Kentucky had the right to prescribe congressional districts in such manner as it pleased, and courts had no judicial power to review it.

Brief, p. 50.

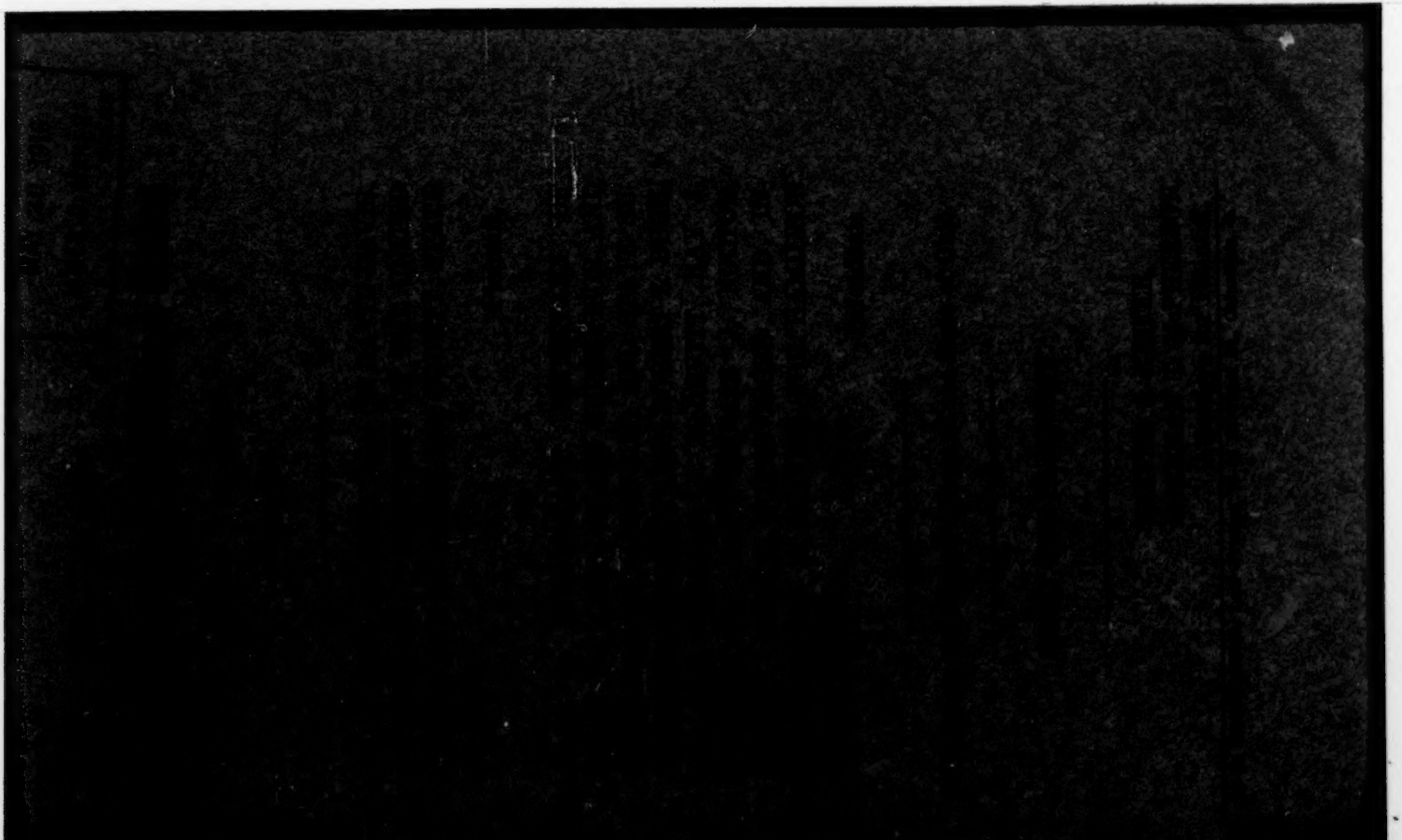
And this court (218 U. S., 187), entertained jurisdiction in the same case, but dismissed it because it had become a moot case. We have reviewed these cases and cited many others sustaining the justiciary character of this one. Brief, pp. 50-53.

Respectfully submitted,

KEIFER & KEIFER,

SHERMAN T. MCPHERSON,

Attorneys for Plaintiff in Error.



INDEX.

TABLE OF CITATIONS.

Index.

IN THE

Supreme Court of the United States

October Term 1915.

No. 987.

STATE OF OHIO ON RELATION OF DAVID DAVIS, A CITIZEN AND RESIDENT OF THE UNITED STATES AND OF HAMILTON COUNTY, STATE OF OHIO,

Plaintiff,

vs.

CHARLES Q. HILDEBRANT, SECRETARY OF STATE OF OHIO, STATE SUPERVISOR AND INSPECTOR OF ELECTIONS AND STATE SUPERVISOR OF ELECTIONS; ROBERT Z. BUCHWALTER, WILLIAM J. McDEVITT, RAY J. HILDEBRAND, AND THOMAS J. NOCTOR, DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTIONS FOR HAMILTON COUNTY, OHIO,

Defendants.

BRIEF FOR PLAINTIFF.

THE CASE.

This action was brought originally in the Supreme Court of Ohio to require the Secretary of the State of Ohio as state supervisor and inspector of elections and

state supervisor of elections and Robert Z. Buchwalter and three others, deputy state supervisors and inspectors ol elections for Hamilton county, Ohio, to provide for and hold elections for representatives in Congress and to otherwise perform their duties as such official as required by law, they having refused on demand to perform them.

The original petition states the duties devolving on the defendants and the relief sought.

Record, pp. 13-17.

No issues of fact have arisen in the action. A demurrer was filed for the secretary of state.

Record, p. 18.

The other defendants, deputy state supervisors and inspectors of Hamilton county, Ohio, whose jurisdiction and duties relate to the First and Second Congressional Districts of Ohio, answer jointly, admitting the allegations of fact in the petition.

Record, p. 19.

The case was heard on the pleadings for final decision by consent, waivers, etc., and a final judgment was entered refusing the writ of mandamus prayed for, etc.

Record, p. 11.

For assignments of error in this court, see:

Record, pp. 4-6.

They all relate to the merits of the action. No serious question of the right of plaintiff to maintain the action has been made.

We take the liberty of referring to our opening and reply briefs in the Ohio court, designating them respectively Brief (S. C. O.), and **Reply Brief,** (S. C. O.).

QUESTION.

The general question to be determined is:

Was the redistricting act of the Ohio legislature annulled by petition, or by referendum vote, as provided in the constitution of Ohio?

And this involves the applicability of referendum (if valid as a constitutional provision) to reject said act; also whether **referendum**, as provided for in the constitution of Ohio, is **"republican in form"** and constitutional.

OHIO LEGISLATION.

The legislature of Ohio passed, April 28, 1913, an act suppplemental to Sec. 4828, G. C., called Sec. 4828-1, which divided the state of Ohio into 22 congressional districts.

Ohio Laws (1913) Vol. 103, p. 568.

The legislature of Ohio passed, May 27, 1915, an act amending and repealing said Sec. 4828-1 (the 1913 act) and divided the state into 22 congressional districts, differing in boundaries from the 1913 act.

Ohio Laws (1914-1915) Vol. 106, p. 474.

Both acts created districts according to the act of congress "for the apportionment of representatives in congress among the several states under the thirteenth census." (1910.)

U. S. Stat. 1, Sess. 62 Cong. (passed Aug. 8, 1911), Sec. 3.

A referendum vote, held November 2, 1915, rejected the 1915 act, which annulled it and left the 1913 act in effect if referendum could apply to it. If referendum was not applicable to either act, then the 1915 act is in force.

Repeal of the former act was proper but not necessary as the right to prescribe the time, manner, etc., of electing representatives to congress is a continuous one, the latest act being operative, like rules for a legislative body.

II Hinds' Prec., p. 25.
U. S. v. Ballin, 144 U. S., p. 5.

FEDERAL CONSTITUTIONAL PROVISIONS.

The constitution of the United States grants power to state legislatures thus:

> "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state **by the legislature thereof**; but the congress may at any time by law make or alter such legislation, except as to the place of choosing senators."
>
> Art. I, Sec. 4, Con. U. S.

The constitution of the United States also provides:

> "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed."
>
> Art. XIV, Sec. 2.

There are other instances where the constitution of the United States confers special rights on state **legislatures**, and they serve to show that Sec. 4, Art. I, confers an exclusive **right.**

Art. II, par. 1 (relating to presidential electors), reads:

> "Each state shall appoint, in such manner as the **legislature** thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress."

Art. I, Sec. 8 (par. 11), requires, before sites for forts, etc., are purchased:

> "**Consent** of the **legislature** of the state in which the same shall be, for the erection of forts, magazines, and arsenals, dockyards, and other needful buildings."

Art. IV, Sec. 4 (relating to the U. S. protecting states from domestic violence), reads:

> "Shall protect each of them against invasion, and on application of the **legislature**, or of the executive (when the legislature cannot be convened) against **domestic violence.**"

Art. V, relating to congress calling conventions to amend the constitution of the United States and to ratifying amendments, reads:

> "On application of the legislature of two-thirds of the several states, shall call a convention for proposing amendments, which * * * shall be valid * * * as parts of the constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as * * * may be proposed by congress."

Art. VI declares:

> "The constitution and laws of the United States * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Sec. 3, Art. II, required:

> "Senators from each state, chosen by the legislature thereof."

This was (1913) amended (Art. XVII) requiring their election by the people.

FEDERAL STATUTES.

U. S. statutes require representatives to be elected in separate districts composed of contiguous territory.

R. S. U. S. (1878), Sec. 25.
Now U. S. Statutes (passed Aug. 10, 1911).
Sec. 3 (62 Cong.), p. 14.

Representatives are required to be elected the Tuesday after the first Monday of November in even numbered years.

Sec. 24 R. S. U. S.
G. C. (Ohio) Sec. 4828.
Present Stat. U. S. (1911) Sec. 14, p. 14.

These provisions contemplate redistricting by state legislatures.

For reference to the foregoing U. S. laws, see:

Ex parte Yarmouth, 110 U. S. p. 660-1.

REFERENDUM—CONSTITUTION OF OHIO.

The constitution of Ohio, as amended (Sept. 12, and took effect Oct. 1, 1912), for the first time, provides, by petition, for a referendum vote on laws passed by the legislature of the state. It reads, in part:

> "The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general as-

smbly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls."

Art. II, Sec. 1, Con. of Ohio.

A referendum vote can be had on a law only after petition signed by:

"Six per centum of electors * * * filed within ninety days after any law shall have been filed by the governor in the office of the secretary of state."

Art. II, Sec. 1c, Con. of Ohio.

This six per centum is based on the number of votes cast at the preceding governor's election. (Art. II, Sec. 1g.)

The exceptions from petitions and referendum are:

"Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions and emergency laws necessary for the immediate preservation of the public peace, health or safety."

And such laws must pass on a two-thirds, yea and nay vote, of all members of the general assembly.

Art. II, Sec. 1d.

But first we submit that the language of Sec. 4, Art. I, constitution of the United States is supreme as to the power it grants to legislatures, and that its meaning has not changed.

RULES OF CONSTRUCTION.

The constitution of the United States is supreme whenever it speaks; and certainly as to matters relating to its own organization and existence.

Con. of U. S., Art. VI (original).
Ex parte Seibold, 100 U. S. 371, 10-11, pp. 298-9.
Ex parte Yarborough, 110 U. S. 651-2, 658, 661.

The following are some authoritative constructions of the constitution of the United States and the powers thereunder, important in determining the main question here involved.

The **consequences** of a constitution or law should be taken into consideration in construing it.

Slaughter House Cases, 16 Wall, 36, 78.
4 Ency. U. S. Rep. p. 50, par 12, and n. 83.

"Constitutional mandates are imperative. The question is never one of **amount,** but one of power. The applicable maxim is "obsta principiis," not "de minimis non curator lex." And so whenever a particular object is to be effected, the language of the constitution is always imperative," etc.

Fairbanks v. U. S., 181 U. S. 283, 291.
4 Ency. U. S. Rep. p. 50, par. 12, and p. 83.

"The constitution is a written agreement. As such its meaning does not alter. That which it meant when adopted it means now."

4 Ency., U. S. Rep. p. 36, par. 3, n. 39.
Scott v. Sanford, 19 How. 393, 426.
McPherson v. Blacker, 146 U. S. 1, 36.
Parker v. Loan Co., 158 U. S. 601, 621.
South Carolina v. U. S., 199 U. S. 437, 448.

"Courts must look to the history of the times and examine the state of things then existing when it

(the constitution) was framed and adopted in order to correctly interpret its meaning."

4 Ency., etc., p. 37, n. 41.
R. I. v. Mass., 12 Peters, 657, 723.

So as to contemporary exposition.

4 Ency., etc., pp. 37-8, n. 43.

"When called on to construe and apply a provision of the constitution of the United States we must look not merely to its language, but to its historical origin," etc.

Missouri v. Illinois, 180 U. S. 208, 219.

A state is described and defined—"a government under which the people live, etc."

Texas v. White, 7 Wall, 700.

See, as to constitutional limitations of states—

4 Ency., etc., p. 138-9, n. 61.
Barron v. Baltimore, 7 Pet. 243.

The constitution of the United States renders **void**, and **annuls whatever is done in opposition to it.**"

Poole v. Fleeger, 11 Pet. 185, 212d.

"If the power of a state and that of the federal government come in conflict, the latter must control, and the former must yield."

Cummings v. Chicago, 188 U. S. 410, 428.
4 Ency., etc., p. 180.

"The language of the constitution is **imperative** on the **state legislature**, to make laws **prescribing** the times, places and manner of holding elections for senators and representatives, and for the electors of president and vice president."

Martin v. Hunter, 1 Wheat 304.
And see congressional precedents, below pp. 33-38.

* * * * * * * * *

The manner of choosing senators and representatives was one of the numerous compromises and concessions to the states, but conditioned on its being satisfactorily exercised. It is said that

> "Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the light and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."
>
> **Prigg v. Penna.**, 16 Pet. 540, 610.

> "Words and terms are to be taken in the sense in which they were used when the constitution was adopted."
>
> Supra, 223 U. S. 125-6.
> **Veazie Bank v. Fenno**, 8 Wall. 542.
> **Locke v. New Orleans**, 4 Wall. 172.
> **United States v. Harris**, Abb. U. S. 110.
> **United States v. Black**, 4 Saw. 211.
> **Fox v. McDonald**, 101 Ala. 51.
> **Evansville v. State**, 118 Ind. 426, 441.
> Bancroft's His. U. S. Vol. IX, 260.

It is highly significant that the great chief justices and all other of the immortal galaxy of justices of this court have concurred in holding that the words of the constitution of the United States expressed aptly and clearly the meaning they were intended to convey; and that their meaning continues unchanged. Justice Story seems to have lead off (1816) (1 Wheat 314), Marshall, C. J., concurring (9 Wheat 1); Chase, C. J., followed (7 Wall, 721); Waite, C. J. (88 U. S. 171) and Fuller, C. J. (146 U. S. 1) still followed, all other justices of this court concurring in each case.

And, concurring in the same view, were Webster, Clay, Benton and Garrett Davis; also Douglas, Morton,

Dawes, George F. Hoar, who were, respectively, chairmen of election committees of congress. Speakers Reed and Carlisle and others prominent in congress may be added as of like view.

There seem to have been no real dissenting views of judges or statesmen, regardless of political parties.

And see for some pertinent quotations and citations:

Brief (S. C. O.) 12-14, 39-42.
Reply Brief (S. C. O.), 6-8, 9-13.

In an address of the late Justice Lurton he aptly remarks on the unwisdom of disregarding settled construction of our constitution and laws, and the danger, in doing so, of overthrowing our "American commonwealth." He adds that such course **"is a substitute of men for a government of law,"** and "affords opportunities to whittle away broad economic principles * * * which have long received the sanction of statesmen and the approving recognition of a long line of jurists." (237 U. S. ix-x.)

LEGISLATURES POSSESS POWER TO PRESCRIBE MANNER OF ELECTING REPRESENTATIVES IN CONGRESS UNAFFECTED BY REFERENDUM.

But for Sec. 4, Art. 1, Con. U. S., the state legislatures would have no authority relating to the manner of electing senators and representatives in congress, as the state, nor the people thereof, never possessed any authority relating to the organization of the congress of the United States.

Referendum, if constitutional, cannot be used to overthrow express powers derived solely from the constitution of the United States.

Referendum was unknown when the constitution of the United States was (1789) adopted. Referendum is, in no way, a part of the legislative power of the United States. No law of the Ohio legislature requires an approving vote of the people. By a vote of the people, through the **initiative**, a measure which the legislature refuses to pass may become a law by a vote of the people, entitled, **"Be it enacted by the people of the state of Ohio."**

Art. I, Sec. 1b, 1g, Con. of Ohio.

An act of the legislature is styled: **"Be it enacted by the General Assembly of Ohio."** Art. II, Sec. 18.

The reservation (Sec. 1, Art. II), to the people of the state to reject laws passed by the legislature, cannot be held to reserve to them rights they never had; and rights reserved to the states or the people by the constitution of the United States, are rights possessed by all the states or all the people thereof.

Arts. IX and X, Con. U. S.

The right to create or participate in creating the congress is necessarily vested absolutely in the United States.

Con. U. S. Art. I, Sec. 1.

Referendum, in Ohio, is in the most absolute form. It, however, does not have anything to do with enacting a law by the legislature. It is only to be used to **reject** a law passed by the legislature which would otherwise go into effect. A referendum vote is in no case required to approve a law thus enacted before it goes into effect.

Con. of Ohio, Art. II, Secs. 1 and 1c.
Supra, p. —.
(**Petition** alone takes away legislative power.)

And the so-called referendum sections undertake to prevent a law enacted by the legislature from going into effect for ninety days after its passage, and, by petition, prevent its going into effect at a next succeeding congressional election, without a vote thereon, if passed within seventeen months of such election, thus, practically preventing the legislature from prescribing for the election of representatives within a reasonable time before such election. See on this:

Brief (S. C. O.) pp. 7-9.

(There is but one legislature of a state and it acts alone.)

Strictly speaking the **prescribing** required by Sec. 4 Art. 1 of the constitution of the United States, is not a law in the ordinary sense; especially not a law of the state; it is the discharge of a delegated federal duty or power, often called a federal act, the same as if passed by congress under the same provision of the constitution of the United States. In the absence of that provision neither the legislature nor the people of the state would have any authority in the premises.

The matter of electing senators was provided for in the same article (1) and section (4) of the constitution of the United States, and in the same language. There was as much right for the people, through referendum, or otherwise, to interpose and assume to regulate or elect senators as representatives.

The supreme test as to the application of the Ohio referendum, either by petition or by vote of the people is, whether or not it would control or tend to control, limit or tend to limit or govern the legislature of Ohio in performing its duty and in exercising the power absolutely imposed on it by the constitution and laws of

the United States. If, in any way, such referendum would have such effect, it is wholly inapplicable, as are all state constitutions and laws having such effect.

If the constitution of Ohio, or a law passed in pursuance thereof, directly and expressly provided that the legislature of Ohio should not obey the constitution of the United States and the laws thereof relating to redistricting the state for congressional purposes and as to fixing the times, places and manner of holding elections for representatives in congress, etc., save as directed by the vote of the people of Ohio, everybody would, at once, agree such provision was **void.**

In line with our contention it is held that jurisdiction conferred by the constitution of Ohio cannot be taken away by the legislature.

Randall v. State, 64 O. S. 64.

"What cannot be done directly cannot be done indirectly."

It is easy to show, conclusively, that the referendum, if applicable, would operate exactly as the suggested provision would.

If the Ohio referendum was applied to a redistricting act the congressional apportionment would have to be made for a new congress long enough before the representatives were required to be elected thereto to enable the redistricting act to be passed.

The only question here is—can an act of the legislature of Ohio providing the manner of electing representatives to congress be vetoed by a vote of the people of the state?

Referendum amounts to nothing more than a veto.

We submit that the veto of the governor is not required to make valid an act of a legislature prescribing the manner of electing representatives in congress.

We believe a resolution by the legislature prescribing the congressional districts of Ohio would be amply sufficient to meet the requirements of the constitution of the United States, and form what clearly indicated the will of the legislature, would be sufficient, and we do not believe such an act of the legislature, whether prescribed in the form of a law or resolution would require the signature of the governor. (See Brief (S. C. O.) pp. 27-8.)

In our opinion the people of the state can, in no sense or at any time, under any circumstances be called the legislature as contemplated in the constitution of the United States.

The question here involved is supported by views of the most distinguished jurists and statesmen of this country for more than one hundred years.

In the Massachusetts convention of 1820 to revise its constitution a resolution was submitted to provide for the election of members of congress in such districts "as the legislature shall direct," which would have been a limitation on its power granted by the constitution of the U. S.

In the discussion which followed, Justice Story, a member of the convention, declared that the resolution

> "assumes control over the legislature which the constitution of the United States does not justify. It (the legislature) is bound to exercise its authority according to its own views of public policy and principle; and yet this proposition compels it to surrender all discretion. In my humble judgment, and I speak with great deference for the convention, it is a direct and palpable infringement of the constitutional provision to which I have referred."

Justice Story was followed by Daniel Webster, also a member, who declared that

> "Whatsoever was enjoined on the legislature by the constitution of the United States, the legislature was bound to perform, and he thought it would not be well by a provision of this constitution to regulate the mode in which the legislature should exercise a power conferred on it by another constitution."
>
> 1 Hinds' Prec. p. 653.

Of course, the proposition failed.

Justice Story had (1816) delivered the opinion in 1 Wheat, 304, on the same question, and both he and the great constitutional lawyer, Webster, never had occasion to change their opinion that nothing in a state constitution could interfere with the right given to the legislaure of the state by Sec. 4, Art. I, Con. of the U. S.

And nothing is better grounded in sound principle and right reason and better settled by authority than that where a power is solely conferred, whether personal, judicial or legislative, no interference with its independent exercise is tolerated or permitted.

FEDERAL AND STATE DECISIONS.

The question of the power granted to a state legislature to exclusively "prescribe" the

> "times, places and manner of holding elections for senators and representatives in congress."

also presidential electors, etc., has been frequently determined judicially, and in each branch of congress.

> We have quoted or referred to the several provisions of the constitution of the U. S. granting power to state legislatures, supra.
>
> And we, for obvious reasons, disregard here the recent amendment to the constitution of the U. S.

providing for the election of senators by the people of each state, save as a national example of the necessity to change the power granted state legislatures by amending the constitution of the U. S. (Supra.)

We call attention to cases already cited showing the exclusive right given to state legislatures to prescribe the manner, etc., of electing representatives.

The whole question was considered and decided in a Michigan case involving the choice of **electors**, where it was strenuously claimed more authority was given to states as to **electors**, than is given to legislatures to **prescribe** as to the election of **representatives**.

The language used as to electors reads:

"Each **state** shall appoint, in such manner as the legislature may direct."

Con. U. S. Art. II, Sec. 1, par. 2.

And as to senators and representatives the language used reads:

"The times, places and manner of holding elections for senators and representatives **shall** be **prescribed in** each state by the **legislature** thereof."

Art. I, Sec. 4, Con. U. S.

(Michigan Case.)

What is known as the Michigan case, tried and decided the same way in the state and federal Supreme Courts is, in principle, decisive of this case.

McPherson v. Blacker, 92 Mich. 337.
McPherson v. Blacker, 146 U. S. 1, 35.

The provision relating to the election of electors is substantially the same as for electing representatives.

Art. II, Sec. 2.

The history, at some length, of this case is recited and liberal quotations from it will be found in our brief (S. C. O.) 19-25.

The Michigan court held, both in syllabus and opinion, that the legislature had the right to require the states to elect electors in separate districts, and that right was exclusive and could be exercised as often as it pleased. (92 Mich. 378-380.)

The Michigan act, sought to be declared void, provided for representative districts as well as for electors.

Chief Justice Fuller, in the opinion, takes more than usual pains to review the whole subject of the power conferred on state legislatures by the constitution of the United States, including, specially, as to "times, places and manner" of holding elections for representatives as conferred by Sec. 4, Art. I.

Supra, 146 U. S. 25-35.

He says:

> "What is forbidden or required to be done by a state is forbidden or **required** of the legislative power under state constitutions as they exist. The clause under consideration does not read that the **people** or the **citizens** shall appoint," etc. (p. 25).

He also refers to the fact that the constitution of the United States (Sec. 2, Art. 1) provides that representatives shall be "chosen every second year by the **people** of the several states," and that the general practice was for the state legislatures to require them to be elected by districts, adding:

> "It has never been doubted that representatives in congress thus chosen represented the entire people of the state acting in their sovereign capacity." (p. 26).

Also that—

> "It (the constitution) recognizes that the people act through their representatives in the legislature, and leaves it to the **legislature exclusively to define the method** of affecting the object." (p. 27).

The chief justice follows (pp. 27-32) with an historical review of how different state legislatures have exercised their power to appoint electors, likening such power to that they exercise in providing for the choice of **representatives**, and he quotes, with approval, from a report of Senator Morton on the subject to show such power is

> "placed absolutely and wholly with the **legislatures** of the several states." (p. 34).

Adding:

> "This power is conferred upon the legislatures of the states by the constitution of the United States and **cannot be taken from them or modified by their state constitutions** any more than can their power to elect senators."
>
> "Whatever provisions may be made by statute, or by the state constitutions, to choose electors by the people, there is no **doubt of the right of the legislature to resume the power at any time**, for it can neither be taken away or abdicated."

Also adding:

> "From this review * * * it is seen that from the foundation of the government until now the practical construction of the clause has conceded plenary power to the state legislature in the matter of appointing electors." (p. 35).

And further:

> "The question before us is not one of **policy**, but of **power**," etc.
>
> "The prescription of the written law cannot be overthrown because the states have latterly exer-

cised in a particular way a power which they might have exercised in some other way * * *."

"Still less can we recognize the doctrine that because the constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of the framers, and not arising in their time, it may, therefore, be wrenched from the subjects expressly embraced within it." (pp. 35, 36).

Also:

"We repeat that the main question arising is one of **power** and not of policy." (p. 42).

Further quotations from this Michigan case will be found in:

Reply Brief (S. C. O.) 6-7.

And see:

Texas v. White, 7 Wall, 700, 721.

These principles, so emphatically laid down, are each and all applicable and conclusive of a like (or even greater) power granted to legislatures of states (Art. I, Sec. 4) by the constitution of the United States. If any difference were possible, it is in favor of an **exclusive power** being vested in state legislatures in the matter of "prescribing" for the election of "senators and representatives," as said Sec. 4 does not vest any right, as to the manner of their election, in the state as does the section relating to electors.

See both sections, **Supra**, pp. —

Could it be possible that a state might have been deprived of its right to choose United States senators, or that the time, place or manner of choosing them could have been defeated or controlled by a "petition" for a referendum, or by a referendum vote?

And as we have seen, Sec. 1c, constitution of Ohio, prohibits a law of the legislature going into effect for ninety days after its passage. If a state constitution could prevent its legislature from prescribing the manner of electing representatives for three months, it could prevent it altogether.

There certainly can be no right in a state, by its constitution or otherwise, to suspend for any time the right or power given by the constitution of the United States.

Other federal cases might be consulted, not already referred to specifically, which support the exclusive power we maintain exists in state legislatures.

Chisholm v. Georgia, 2 Dall. 419.
Leitensdorfer v. Webb, 20 How. 176.
Ex Parte Seibold, 100 U. S. 271.
In re Green, 134 U. S. 377.

If referendum applies to Ohio to defeat the power of its legislature to regulate the election of Representatives in Congress, it would necessarily apply to defeat its power as to the appointment of electors. Also to the other instances where power is given by the Constitution of the United States (quoted, **Supra,** pp. ——) to state legislatures.

It may be asked: When did the redistricting act of 1915 take effect? The answer is twofold: it took effect on its passage by the legislature, because then the legislature had executed its power under the Constitution of the United States; and it could take effect otherwise under the Constitution of Ohio, on its approval by the governor and "filed with the secretary of state," and, in the absence of a date being fixed therein, under Section 16, Art. II, Con. of Ohio. The act does not fix, or need to fix, a date for its taking effect.

It is held, in a California case (1889) that where a power is imposed on the **legislature** of a state by its constitution, that, although its **laws** are required to have approval of the governor, his approval is not necessary to the exercise of such power.

This language is used:

> "The governor is not, in fact, a part of the legislature. The constitution provides: 'The legislative power of this state shall be vested in a senate and assembly.' It will be seen therefore, that the **legislature** is one thing, and the law-making power of the state another."

Adding, as to the matter submitted, that:

> "It provides for the submission to the **legislature**, which does not include the governor."
>
> **Brooks v. Fischer**, 21 Pac. Rep., 652-3.

The Constitution of California uses substantially the same language found in the Ohio Con., Art. II, Sec. 1. And the term "general assembly" is held, in a criminal case in Ohio, to mean "**legislature.**"

> **State v. Gear**, 7 Ohio, N. P., 551.

> "It (the constitution) recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object." (146 U. S., 27).

And see, infra, quotations, from reports, etc., pp. 42-46.

It follows that if Ohio's Constitution contained an express provision that no act of its legislature should be effective unless approved by a vote of the people it would be in conflict with the Constitution of the United States, and, consequently, **void**. The people of the state can-

not (nor the governor) **veto** an act of the legislature on the subject.

The Congress is a creation of the states of the Union, successor to the Continental Congress (one body) under the Articles of Confederation, which first met in 1774; and to establish a true representative government under the powers and limitations of the Constitution of the United States and by which the organization of the Congress was solely provided for, and, in no sense, was it ever a state matter. And it is settled that where a right may be exercised by both federal and state authority, the former is paramount.

It may be said that the

> "Powers not delegated to the United States nor prohibited to the states, are reserved to the states respectively or to the people." Art. X, Con. U. S.

This, so far as it has any real meaning, is a reservation to all the states and to all the people of the United States collectively, and not to one state or the people thereof.

But this clause of the constitution reserves no political-governmental rights at all, save such as may be worked out through prescribed methods of changing or amending the constitution.

All power is delegated to the United States to provide a Congress, and therefore prohibited to the states, and "to the people."

The first section of the constitution of the United States provides for and vests all legislative powers granted by the Constitution of the United States in a Congress, composed of a senate and house of representatives. Art. I, Sec. 1.

It is also provided that:

> "Representatives shall be apportioned among the several states according to their respective numbers."
>
> Con. U. S., Art. XIV, Sec. 2 (Amendment).

Congress is given the

> "power to enforce by appropriate legislation the provisions of this article." Art. XIV, Sec. 5.

The same rule of apportionment was in the Constitution of the United States on its adoption (1789), Art. I, Sec. 2.

Among the powers of Congress granted is the right to make all laws necessary to

> "carry into execution * all * powers vested by the Constitution of the United States in the government of the United States, or in any department thereof."
>
> Art. I, Sec. 8 (par. 18).

The right reserved to Congress (Sec. 4, Art. I), in the Constitution of the United States to, "at any time by law make or alter * * * regulations" of state legislatures as to the "times, places and manner of holding elections for senators and representatives," has been frequently exercised by Congress, at least in part.

The last apportionment act fixed the number of districts in each state. U. S. Stat., 1 Sess., 62 Cong. (1911), p. 13. And this act and other general laws, also fix the time (Tuesday after the first Monday in each even year) for electing representatives.

> R. S. U. S. (1878), Sec. 24.
> See Ex Parte Yarborough, 110 U. S. (660-2).

But we have seen (**Supra**, p. —) that it was left by the last (1911) apportioning act of Congress to the state

legislatures to redistrict the states for the purpose of electing representatives, and this has accordingly been done.

It should be observed that there was no referendum in Ohio at the last (1911) apportionment, and none anywhere when the Constitution of the United States went into effect (1789).

The people of the state have no more power to interfere with this legislative redistricting than to make "regulations" or a law changing the apportionment among the states or the time of holding the election of representatives.

Congress can only look to the legislative redistricting to see whether or not it is called upon to, in the exercise of its reserved power, change or alter it.

In the matter of districting a state for congressional purposes, the people of the republic can only speak through state legislatures.

If, as must be conceded, the people of Ohio cannot create congressional districts or change or alter existing ones by vote. It is impossible for them to reject an act of the state legislature redistricting the state, or prevent it going into effect for ninety days or for a much longer time by petition of a small fraction of its electors as the plan of referendum provides:

"The functions of a legislature must be exercised by it **alone** and cannot be delegated."

6 Am. & Eng. Ency., p. 1021, n. 6.
Cincinnati v. Clinton Co., 1 O. S., 77.

"The power of the general assembly to pass laws cannot be delegated by them to any other body or to the people."

(Supra), 1 O. S., 77, 87.

It follows that the power exclusively given to the legislature by the supreme organic law of the United States cannot be either delegated or assumed in any manner by the people of the state of Ohio.

> "Provisions of a state constitution that are in conflict with those of the federal organic law will be declared inoperative."
>
> 6 Am. & Eng. Ency., pp. 1079-1080, n. 1.
> Cooley on Limitations.
> **Dodge v. Woosley**, 18 How., 331.
> **Gunn v. Barry**, 15 Wall., 610.
> **Gas Co. v. Light Co.**, 115 U. S., 672.
> And see below—Congressional Precedents, pp. 33-38.

Each government is sovereign within its own powers.

> 4 Ency., U. S. Rep., 185, n. 19.
> **Republic v. Cobbett**, 3 Dall., 467, 473.
> **McCullough v. Maryland**, 4 Wheat., 376.

In the instances where (as under Sec. 4, Art. I, Con. U. S.) the right is given to exercise a certain power by law, and the right is reserved to Congress "to make or alter such legislation," the latter's failure to act leaves the legislature with such full power.

> 4 Ency. U. S. Rep., p. 175, n. 90.
> **Sturges v. Crowingshield**, 4 Wheat., 122.

> "Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the state retires and lies in abeyance until a proper occasion for its exercise shall recur."
>
> 4 Ency. U. S. Rep., 175-6, n. 91.
> **Gilman v. Philadelphia**, 3 Wall., 713.

CONGRESSIONAL PRECEDENTS.

The principle involved of the right by referendum to control or defeat the power given to state legislatures has been long settled by the action both of the senate and house of representatives of Congress.

(Missouri Cases.)

Long since (1844) the house of representatives of Congress, through a report of Stephen A. Douglas for a committee, decided that Congress had no power to **require** a state legislature to create separate districts for its members, but that the legislature could provide for their election at large, uncontrolled by any authority, unless Congress chose to provide otherwise instead of the legislature, as authorized by Section 4, Art. I of the Constitution of the United States.

The report and decision of the house was that Congress possessed no power to compel a state legislature to prescribe any particular plan for fixing the "times, places and manner of holding elections for senators and representatives."

This report concluded by saying, the constitution—"the great charter,"

> "intended that the regulation of the times, places and manner of holding the elections should be left **exclusively** to the legislatures of the several states."

subject, only, to independent congressional action.

Douglas and others in debate insisted that "**Congress** had no power to **district** the states, for that would be to prescribe the qualification of voters as to residence."

1 Hinds' Prec. of H. of R., pp. 170-2, Sec. 309-310.
I Bart. Con. Elec. Cases, pp. 47, 60.

(In cases last cited are found important history relating to embodying the provisions in question here).

And see like history summarized by Senator Douglas, and others, 1 Bart, &c., pp. 51-7.
Brief (S. C. O.), pp. 41-46.

(Iowa Cases.)

The Holmes and other cases arising from Iowa (1880) are to the same effect in denying that a state constitution cannot control its legislature in the matter of districting, etc.

1 Hinds' Prec., pp. 667, 672, Sec. 525.

(Virginia Cases.)

One Segar presented (1861) credentials showing his election to the house from the First District of Virginia. It turned out that he was elected in a district created by the people in convention and not by a legislature of the state, though there was one in existence that had not districted the state. It was held that a legislature being in existence it, only, could district the state.

1 Hinds' Prec., pp. 391-2, Sec. 363.

The Beach-Virginia case resulted in a similar decision in the house.

1 Hinds' Prec., pp. 300-2, Sec. 367.

In the Davidson-Gilbert contest (1901) arising from Kentucky, it was claimed that the legislative redistricting

> "act was contrary to the state constitution, and that it had never properly passed the legislature."

The house committee dismissed this contention "without discussion, as having no foundation."

It also upheld the legislature's exclusive right to, as often as it pleased, redistrict or change or alter districts.

1 Hinds' Prec., pp. 180-1, Sec. 313 and p. 672, Sec. 525.

See, also, as sustaining the view that a state constitution cannot control its legislature: West Virginia (1873) and Colorado (1877) cases.

1 Hinds' Prec., pp. 659, 653-4, 661-672, Sec. 522, 524.

Some distinguished statesmen have, with great force, maintained that when a state legislature prescribes for the election of senators and representatives, and also electors, as the Constitution of the United States authorizes, its acts are the federal laws, not state.

1 Hinds' Prec., p. 172, Sec. 310, 525, u. 24, Sec. 856.

The sole power of the state legislature is derived from the Constitution of the United States. The rights involved are not of individuals who may be elected or defeated or of the people of districts or of a whole state but of the **whole United States.**

(Michigan Case.)

The case of **Baldwin v. Trowbridge** (1866) arose in Michigan and involved the right of its legislature to fix the times, etc., for electing representatives in Congress, resulted in sustaining such right, both by committee report and the judgment of the house. The report is able, elaborate and conclusive.

II Hinds' Prec., pp. 24-6, Sec. 856.

The Baldwin v. Trowbridge case **(Supra)** is also cited in the same book, p. 240.

Also in Contested Election Cases in Congress (1865-1871), p. 43.

And this language is used:

> "The **legislature** of a state does not acquire its right or power to make a law regulating the manner of holding elections for representatives in Congress from the constitution of the state, but this right and power is derived **exclusively** from the Constitution of the United States."
>
> II Hinds' Prec., p. 240, Sec. 947.

(Minnesota Case.)

The memorable Donnelly-Washburn case (1880) from Minnesota, involved the right of a state legislature to regulate the time, place and manner of holding an election of a representative, and in the reports thereon the view was upheld that it derived its power "from the federal and not the state constitution."

II Hinds' Prec., pp. 230, 238, 240-1, Sec. 945, 6-7.

The report cited, ex parte Seibold (100 U. S., 371), where this right was considered, quoting from the syllabus this:

> "Where there is a conflict of authority between the constitution and laws of a state in regard to fixing the place of elections the power of the legislature is paramount."

(Tennessee Case.)

The **Davis v. Sims** case (Tenn. 1904), also involved the question of the exclusive power of a state legislature to prescribe the time, place and manner of electing representatives to Congress, and authorities are cited in the report, etc., to support the view that the legislature possessed such power.

II Hinds' Prec., p. 738, Sec. 1132, and p. 742, Sec. 1133.

Baldwin v. Trowbridge, 2 Bart.

Donnelly v. Washburn, 1 Ells., 495.

McCreary's Law of Elections, 109-112.

(Senatorial Cases.)

The decisions on swearing in persons claiming elections as senators as prescribed by state legislatures, are even more emphatic and the members of the senate are more nearly unanimous in holding that state legislatures have exclusive power in the premises than the house.

When (1877) John T. Morgan (Alabama) and L. Q. C. Lamar's (Mississippi) credentials were presented and they appeared to be sworn in as senators, objection was made that in the election the will of the people had been subverted by violence &c., but it was not denied that they had been chosen as prescribed by the **legislature** of Mississippi.

Morton of Indiana and Dawes of Massachusetts, and other distinguished senators were then in the senate. Only one vote was cast against the resolution to swear each in.

I Hinds' Prec., pp. 286-7, Secs. 359, 360.

In the senate election case of **Lucas v. Faulkner** (W. Va., 1887) it was held:

> "In electing a senator the state legislature acts under authority of the Federal Constitution and laws conflicting therewith are **void**."

I Hinds' Prec., p. 841, Sec. 632.

The same section of the Constitution of the United States provides the like rule of electing representatives.

Senator George F. Hoar of Massachusetts objected to Mr. Faulkner being sworn, and his credentials and all papers relating to the case were referred to the senate committee on elections.

On December 4, 1887, Senator Hoar, as chairman, made a **unanimous** report from the committee in favor of seating Mr. Faukner, which was adopted without division.

This language was used in the report:

> "The Constitution of the United States is the supreme authority, and all provisions or statutes of any state are **void** and of no effect unless they

can be construed as not to be in conflict with its provisions."

I Hinds' Prec., pp. 841-3, Sec. 632.

How applicable is this to the Ohio referendum provision?

See also Harlan (Iowa) senatorial case in which it was held that a state legislature in electing a United States senator must act in its separate houses, and not in joint session.

I Hinds' Prec., pp. 1099-1100, Sec. 844.

During the civil war the question of authorizing soldiers outside their States was much considered, and in some States it was held laws permitting it were unconstitutional, but it seems always to have been held that State legislatures by virtue of Sec. 4, Art. II, Con. of U. S., could authorize soldiers to vote anywhere for Representatives in Congress.

Voting in the Field (Benton) 9-10, 85, 100, 103.
And—Opinion of Judges—37 Vermont, 665.

We refrain from considering here other like cases and decisions.

CONVENTIONS.

There has been some confusion rather than conflict of views growing out of admitting new states and electing representatives at the same time as provided in a prior convention plan. Such provisions have sometimes been held to "anticipate the action of a yet to be chosen legislature," but it has always been held that where there was a state legislature its power was exclusive.

I Hinds' Prec., p. 649, Sec. ——, and pp. 653, 655.
I Bart. Con. Elec. Cases, p. 392.
Jameson on Con. Conventions, p. 409.
And see: Brief, (3 S. C. O.), p. 49.

26 SOUTH DAKOTA CASE.

This Dakota case is solely relied on by court or counsel as sustaining the view that Section 4, Art. I of the Constitution of the United States

> "conferred the power therein defined upon the various state legislatures * * as may assume to exercise legislative power, whether that power is lodged in a single or two-chamber body, or whether the functions of the latter be curbed by a popular vote or its enactments approved by a referendum."

The opinion states: "This view is sustained in State ex rel. Schroder v. Polley, 26 S. Dak., 5."

Record, p. 24.

There is not a word in it, syllabus or opinion, that case favoring such view, on the contrary, seeming to avoid any idea that said Section 4 conferred upon state legislatures any such fallacious power, the court in that case held:

> "In the first place, we are of the opinion that **no power** to divide the state into congressional districts was ever delegated to the legislature of the state by Section 4, Art. I, of the Federal Constitution."
>
> 26 S. D. (8).

The opinion further states:

> "Power was not delegated to the state legislature or to the state itself to regulate such elections, because the state already, in its sovereign capacity, possessed that power, and the Federal Constitution simply left that power with the state where it reposed."
>
> (P. 9.)

The court did not care to undertake to recognize any authority conferred on the legislature of South Dakota by the Constitution of the United States, and then try to show that petition and referendum was a part of it, or took away its authority.

That case assumes to be bottomed on the congressional case of Baldwin v. Trowbridge (2 Bart., 46), the only syllabus of which reads:

> "Where there is a conflict of authority between the constitution and legislature of a state in regard to fixing the place of elections, the power of the **legislature is paramount.**"

The converse proposition was voted down, 30 for, 108 against.

> Baldwin v. Trowbridge, 2 Bart., 46.
> 2 Hinds' Prec., pp. 27, 240.

Referendum, however, in South Dakota is distinctly different from in Ohio. The people there participate with the legislature in making the laws. They then **compel** the legislature to enact laws they propose and to submit them to a vote of the people. The language of the constitution runs:

> "The people expressly reserve to themselves the right to propose measures, which measures the legislature **shall** enact and submit to a vote * * before going into effect."
>
> Sec. 1, Art. III, Con. S. Dakota.

We have said enough about this case in

> Brief, (S. C. O.), 47-48.
> Reply Brief, (S. C. O.), 8-9.

REFERENDUM—OHIO—NOT REPUBLICAN IN FORM—UNCONSTITUTIONAL.

If referendum, by a vote of a plurality of the voting people, is not "**Republican in form**" it cannot be used to reject, as the Constitution of Ohio provides, the right of the **legislature** of the state to prescribe the "times, places and manner" of electing representatives in Congress, a right given solely by Section 4, Article I, Constitution of the United States.

That such referendum as is provided for by Article II, Constitution of Ohio is **not** republican in form seems clearly and repeatedly held by this court for the reason that it seeks to provide a separate popular form of government wholly independent of the representative constitutional government established for the United States, and inconsistent with it.

> It must be kept in mind that, neither petition or referendum vote had anything to do with the enacting of the redistricting act of 1915.

We refrain from making liberal quotations to define what is not republican in form, and consequently unconstitutional.

Chief Justice Fuller in summarizing settled authority uses this language:

> "By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, national and state, have been limited

by written constituitons, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities."

In re Duncan, 139 U. S., 461.

The chief justice refers to Luther v. Borden, 7 How. (48 U. S), 1, and quotes and approves Webster's argument in that case wherein he recognizes "that the people are the source of all political power" in our American system of government, adding:

"but that as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the constitution of the government and in the enactment of laws; that the people limit themselves in regard to the qualifications of electors and the qualifications of the elected, and to certain forms for the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes;"

Supra, 139 U. S., 461-2.
See also: 6 Webster's Works, p. 217.
4 Ency. U. S. Rep., pp. 319, 330, and notes.

Chief Justice Taney speaking for the whole court says:

"The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

The guaranty necessarily implies a duty on the part of the states themselves to provide such a government. All of the states had governments when

the constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the states to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the constitution."

Minor v. Happersett, 88 U. S. (21 Wall.), 175-6.

We are not here concerned with questions as to how territories might be organized by acts of Congress, but of states.

Justice Brown in an opinion announcing the conclusions of this court says:

"Notwithstanding the duty to 'guarantee to every state in the Union a republican form of government,' Art. IV, Sec. 4, by which we understand, according to the definition of Webster, a government in which the supreme power resides in the whole body of the people, and is **exercised by representatives** elected by them," etc.

Downes v. Bidwell, 182 U. S. (279).

Ohio on its admission into the Union, (1803, under its constitution of 1802, had a legislature composed of a senate and house of representatives and a like legislature under its later (1851) constitution, and it still has, as amended (1912) a like constituted legislature, the language used running thus:

"The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives."

Art. II, Sec. 1, Con. of Ohio.

"Every bill passed by the general assembly shall, before it becomes a law, be presented to the gov-

ernor for his approval. If he approves, he shall sign it and thereupon it shall **become a law** and be filed with the secretary of state.

"All laws of a general nature shall have uniform operation * * nor shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as provided in this constitution."

Art. II, Secs. 16, 26, Con. of Ohio.

"No power of suspending laws shall ever be exercised except by the general assembly."

Con. of Ohio, Art. I, Sec. 18.

The provisions just quoted are each now in the Constitution of Ohio and have been since 1851, including the excepting clause to the last quotation. The so-called referendum provisions found in Article II are, as we have seen, not legislative in character as part of the **legislature** of Ohio, but negative, to reject an act after its passage and would otherwise become a law under the Constitution of Ohio.

Ohio having, on becoming a state in the Union, a republican form of government as required by the constitution and form of the federal government, the people thereof were without power by constitutional amendment or otherwise to change or abolish it.

Von Holst, Const. Law of U. S., 236, 237.
Koehler v. Hill, 60 Iowa, 543.
Appeal of Allyn, 81 Conn., 534.
Cooley Const. Lim. (7 Ed.), p. 62.

The guaranty of a republican form of government is for the people of the states and to each individual citizen and for their protection, as well as to the states as political bodies, and to also secure to each their proper

departments, executive, legislative and judicial, necessary to the exercise of their constitutional powers and duties.

(Even Patrick Henry, much given to advocate a pure democracy against constitutionally delegated powers, conceded that the constitution established a representative government, republican in form.)

See 3 Elliott's Debates, p. 55.
Black's Const. Law (2 Ed.), 262.
Rice v. Foster, 4 Harr. (Del.), 479.
Minor v. Happersett, 21 Wall., 162.
Martin v. Martin, 20 N. J., 421.

To permit a state to change its constitutional form of government to that which is not would be violative of the provision:

"No state shall **make or enforce** any law which shall abridge the privileges and immunities of citizens of the United States."

Art. XIV, Con. of U. S.

The people of a state possess no more independent sovereign right to limit, curtail, reject or take away the powers and duties of a constitutionally organized legislature than they possess to do the same to the executive and judicial departments of the state. If such power can reject a law of the legislature by vote after it has otherwise become a law under the constitution of the state, why may not the same power, exercised by a plurality vote of the people be used to take away all executive and constitutional power vested in the executive of the state, and to alter, change and reverse or wholly take away or annual all judicial power thus vested in the courts?

Even this power has been proposed as an existing sovereignty of the people.

If such power is, as contended (Record, p. 25) "reserved to the states or to the people thereof" (Art. X, Con. U. S.) it certainly includes the people of all the states of the United States, and would give them the sovereign right to, by a rejecting vote, annul all executive, legislative and judicial powers. This would be anarchy and revolution; and our constitutionally created representative government would be overthrown.

But the people of the states and United States reserved no right to limit or destroy the executive, legislative and judicial powers expressly confered by the Constitution of the United States and by the republican form of government thereby established.

We have shown that the legislatures of the states are vested, by Sec. 4, Art. I, Con. of the U. S., with the right to prescribe the "times, places and manner" of electing representatives to Congress, and that they derive no such power from state constitutions.

However, if powers granted alone by state constitutions might be taken away through a change in them from a republican form of government, it seems certain that such change cannot take from a state legislature a power solely derived from the Constitution of the United States.

Brief, (S. C. O.), pp. 6-7, 9-11.
Reply Brief, (S. C. O.), pp. 9-13, 47.

But a majority of the people of a state, by amending its organic law cannot take away rights granted by national authority.

U. S. v. Cruikshank, 92 U. S. (549).

We quote from an opinion of Chief Justice Waite.

"In the formation of a government the people may confer upon it such powers as they choose."

* * * * * *

"Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate states, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated states. For this reason, the people of the United States, 'in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty'' to themselves and their posterity (Const. Preamble), ordained and established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law, and made its rule of action.

The government thus established and defined is to some extent a government of the states in their political capacity. It is also, for certain purposes, a government of the people."

U. S. v. Cruikshank, 92 U. S., 549.

Above and over all, a national government for the states and the people, was framed, with three dominant governing powers, the legislative being necessarily representative, republican in form, as distinguished from a pure democracy where the people are claimed to rule without representative or monarchical power, which was long ago found to be the weakest form of government, if a government at all, that could be attempted.

Even wild Indian and barbaric tribes have their governing chiefs who alone meet in council on great occasions.

The Eskimos are said to have no chiefs or rulers; those only govern while successful in providing for the wants of the tribe they belong to, all property being held in common—socialism.

The Constitution of the United States, (Art. VI) is the Supreme law of the land, and the representative government created by it must obtain.

We take here the liberty of referring to authorities cited in argument in a recent case in this court, Pac. Tel. Co. v. Oregon, 223 U. S., 118.

The citations are to the effect that a democracy is unrepublican; that all citizens are entitled to be protected by a republican form of government; that initiative or referendum is not republican in form. There is a broad difference between a republic and a democracy.

(Supra) 223 U. S. (123.)

A government is not representative and republican in form in which the people at large act as legislators. There are many decisions of courts and congressional reports sustaining this view.

See—Brief (S. C. O.), pp. 39-42.

The debates of the constitutional convention and the federalist papers are important and conclusive as to what is meant by "republican in form." So, Hamilton's Works, &c.

(Supra) 223 U. S., 124.

And see specially:

McCullough v. Maryland, 4 Wheat., 419.
Cohens v. Virginia, 6 Wheat., 418.
Pallock v. Farmer's Tr. Co., 158 U. S., 601.
McPherson v. Blacker, 146 U. S., 1.
R. I. v. Mass., 12 Pet., 657.
Federalist—No. 48, No. 14, No. 10.
12 Hamilton's Works, 28.
2 Elliott's Debates, 253, &c.
Views of John Marshall.
3 Elliott's Debates, 225, 233.
11 Hamilton's Works, 75.

Republican form of government existed in all the states when the constitution was adopted.

5 Elliott's Debates, 239.

Representation is the vital element in a republican form of government.

Supra, 223 U. S., 125.
In re Duncan, 139 U. S., 461.
State v. Swisher, 17 Texas, 448.
Rice v. Foster, 4 Harr. (Del.), 479.
Clarke v. Rochester, 28 N. Y., 606, 633.
Story's Const., 388.
Yearman's Study of Government.
Jefferson's Writings, 452.
Bartlett's Dig. Elec. Cases, 446.

In the Oregon case there arose a question as to the construction of Section 4, Art. IV of the Constitution of the United States, which guarantees "every state a republican form of government," and whether referendum could or did take it away. The case went on writ of error to the Supreme Court of the United States, but it was dismissed, that court holding that the matter of such guarantee was exclusively committed to Congress. The court did not, therefore, pass on the effect of the Oregon referendum. The case, however, has much learning in its presentation. It is therein pointed out that legislation by representatives elected by the people is the distinguishing feature of a republican form of government.

Pac. Telephone Co. v. Oregon, 223 U. S., 118, 124-6.

That the character of our republic is that of a representative government, and not a pure democracy governed by the people, is there discussed, and distinguished, and authorities, historical and judicial, are

largely cited in support of that view. (223 U. S., 120-6). Authorities are cited (p. 121) holding the sovereign power of the states is subordinate to that of the federal government over its citizens.

Crandall v. Nevada, 6 Wall., 35.
Lane Co. v. Oregon, 7 Wall., 76.
Koehler v. Hill, 60 Iowa, 543.
Story on the Con., Sec. 318.
Elliott's Debates, Vol. V, 239.

"Laws must emanate from the law-making power, and in a constitutional republic, that power can only be a representative legislature created in accordance with the organic law."

Supra, 223 U. S., 122.

It is further logically contended that under our form of government, the Constitution of the United States could not (as well as did not) confer legislative power on the people of a state, but could only confer it on its legislature.

The distinction between an oligarchy or a democracy, that is, between a representative republic and a democracy wherein the people made the laws for all, is well defined on the highest authorities. (223 U. S., 123.)

We cite only a few of them here.

Downs v. Bidwell, 182 U. S., 279.
Cooley's Com. Lim., 194.
Minor v. Happersett, 21 Wall, 162.
In re Duncan, 139 U. S., 461.
15 Jefferson's Writings, 452.

It is also maintained that a government cannot be said to be representative in which the people at large make the laws, and that the framers of the constitution recognized the distinction between a representative republic and a democratic form of government. (223 U. S., 124).

For views of John Marshall, later chief justice, see:

3 Elliott's Debates, 225, 233.
Federalist No. XIV.
Hamilton's Works, XI, 101, 103.
5 Elliott's Debates, 136.

And the form of the state governments recognized and perpetuated by the constitution was "with the three departments in force in all the states at the time of the adoption of the constitution.

223 U. S., 124.
5 Elliott's Debates, 239.

It has been repeatedly said that legislation by the people is "subversive of the structure of our republic." (223 U. S., 125, and cases cited.)

> "That the Federal Constitution presupposes in each state the maintenance of a republican form of government, and the existence of state legislatures, to wit: representative assemblies having the powers to make laws; and that in each state the powers of government will be divided into three departments, a legislative, an executive and a judiciary."
>
> * * * * * *
>
> "State legislatures are a vital feature of our government; the Federal Constitution presupposes their existence."
>
> * * * * * *
>
> "Under the constitution the state legislatures are the agency to carry on the relations between the nation and the states."
>
> "The word **'legislature'** in the constitution means a representative assembly consisting of **two houses**, empowered to make the law.
>
> "Such was the meaning at the time of the adoption of the constitution."
>
> 223 U. S., 125.

IF NOT REPUBLICAN IN FORM, JUSTICIABLE IN THIS ACTION.

Assuming, as settled, that referendum as provided for by the Constitution of Ohio, is not "**republican in form**" and therefore unconstitutional, the question arises as to whether the courts have jurisdiction to hold that it cannot be used to reject the 1915 act of the Ohio **legislature** prescribing the "times, places," &c., of electing representatives in Congress.

Admitting (as we do) that it is rightfully settled by the highest authority (223 U. S., 118, and 7 How., 1, &c.) that this court has no jurisdiction to guarantee, by judicial decree, to the states a republican form of government; that the right to so guarantee is political and vested under Art. IV, Sec. 4, Constitution of the United States, we still confidently submit that whenever an action, as in this case, involves a denial of individual rights, courts possess the right and the duty to exclude the operation of the unconstitutional provision and to regard the question arising as judiciary.

In a comparatively recent case it was held that as the action was instituted to enforce the guarantee on the state of Oregon, that this court did not possess jurisdiction for that purpose, but, as we understand, from the chief justice's opinion, this holding applies to the purely political question involved in deciding whether a state government is republican in form,

> "but that the right existed in the courts to exercise the judicial power and ever present duty whenever it becomes necessary in a controversy when properly submitted to enforce the constitution as to each and every exercise of governmental power."
>
> Pac. Tel. Co. v. Oregon, 223 U. S. (118), 150.

That case was an action to require the court to enforce against the state of Oregon Section 4, Article 4, Constitution of the United States; all other grounds of the action being withdrawn, leaving only a purely political question (p. 136). In the closing part of the opinion it is said, among other things, that the license tax complained of was not involved. In the opinion it is made plain that if the claim had been asserted that the company should not be required to pay the tax because its constitutional rights were violated the court would have had jurisdiction to grant relief. This language is used:

> "If such questions had been made they would have been justiciable, and therefore would have required the calling into operation of judicial powers. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here made, is not on the tax as a tax, but the state as a state."
>
> "It is the government * * which is called to the bar of the court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the state that it establish its right to exist as a state, republican in form."
>
> (Pp. 150-1.)

We are only asking in this action that a federal constitutional right shall not be taken away by a provision in a state constitution not in conformity with our form of government and forbidden by its constitution.

While it is true that Congress has the exclusive political and legislative duty and power imposed on it to "guarantee to every state in the Union a republican form of government," there is no power withheld from

the courts to adjudge, that which, in a state constitution or law, may be violative of the Constitution of the United States, to be invalid and inoperative to affect private or personal rights until Congress takes proper action.

And we are not dealing, as do cases hereafter mentioned, with general political rights guaranteed to citizens by provisions of the Constitution of the United States supposed to have been taken away by state constitutions or laws. Our claim is that a state constitutional provisions, not "republican in form," is used to take from a **legislature** of a state a power solely conferred on it by the Federal Constitution, and a power required to be exercised in electing representatives in the Congress of the United States.

In an early case (in trespass) the principal question arose as to which of two bodies constituted the legislature of Rhode Island, this court held the courts of the state had a right to declare which was the rightful one, and the questions arising concerned "merely the constitution and laws of the state," and still this court entertained jurisdiction.

Luther v. Borden, (7 How.), 48 U. S., 1.

The case clearly distinguished cases between citizens and a state involving questions of the rightful making or the wisdom of its constitution and laws and cases where individual personal rights, political and otherwise, were involved.

Supra, 48 U. S., 54, 59.

This court has very often taken jurisdiction in cases involving rights of private parties as affected by pro-

visions of the Constitution of the United States, though political, like the franchise to vote, &c. See citations:

223 U. S., 127-8.
Forsyth v. Hammond, 166 U. S., 519.
Yick Wo. v. Hopkins, 118 U. S., 369.
Boyd v. Thayer, 143 U. S., 135.
Coyle v. Smith, 221 U. S., 559.

And so in an action between a state and the United States involving Sec. 4, Art. IV, relating to states being required to be republican in form.

South Carolina v. U. S., 199 U. S. (437), 454.
Taylor v. Beckham, 178 U. S. (548), 578-9.
Texas v. White (7 Wall.), 74 U. S., 700, syl. 10.
In re Duncan, 139 U. S., 449, 461.

A Kentucky case has been claimed to hold that this case was political and therefore not justiciable.

Richardson v. McChesney, 128 Ky., 363.

The action was in mandamus to compel the legislature to provide certain geographical congressional districts. The court held it had no jurisdiction to control it; that:

> "The Constitution of the United States contains no direction to the states on the matter of apportionment of the state into congressional districts." (P. 363, syl. 2.)

And see same case—218 U. S., 487.

We repeat, it is impossible to conceive that a provision in a state constitution repugnant to our form of government and the Constitution of the United States can be used to overthrow a power granted by the latter constitution to a state legislature to do that which is essential to the organization or, possibly, the very existence of the Congress of the United States.

REVIEW OF OPINION OF SUPREME COURT OF OHIO.

The last syllabus of the case is not questioned. The others are inconsistent in themselves, and with each other, and not consistent with the facts and the constitutional provisions referred to, and are not supported by any authority whatever.

I.

Legislature—What Constitutes.

The first syllabus declares the

> "term 'legislature' in Section 4, Article I, of the United States Constitution * * includes not only the two branches of the general assembly, but the popular will as expressed in the referendum provided for in Sections 1 and 1c of Article II of the Ohio Constitution."
>
> Record, p. 20.

This is another form of stating that the word "**legislature,**" as used in said Section 4, Article I, includes that which has nothing to do with it enacting laws, or their going into effect, or even of approving laws passed by legislatures, and something more than Ohio's constitution expressly provides shall constitute its sole legislative authority.

> Art. II, Sec. 1.

This holds that the word "legislature" meant another agency, in no sense a part of it, but possessed of an independent power to **reject** law of the legislature after it has been duly passed—that an agency that has

nothing to do with enacting a law is a constituent part of the body that enacted it. This holds that the sense in which the word **legislature** was used and understood by the framers of the Constitution of the United States, is not the sense in which the word is to be regarded now. This applies the theory that the "popular will" acting independently of the **legislature** to veto laws which go into force under both the State and Federal constitutions is a part of the legislature of the State of Ohio.

There are, in no proper sense, branches to a legislature; it is an entity, composed, in Ohio, of a Senate and House of Representatives, requiring only the concurrent act of each to pass a law. (Art. II, Sec. 1.)

It seems worse than absurd to say the "popular will", by a referendum vote, after being petitioned for by a small fraction of the electors, may be invoked to reject a law that has been regularly passed as much as seventeen months before such vote, and that it becomes a part of the legislature that passed the law that it rejected or thus vetoed. The sole power to reject, under certain circumstances and conditions, a legislative act, cannot constitute the rejecting agency a part of the body which enacted the law.

It must be kept steadily in mind that the popular will or so-called referendum has no part, directly or indirectly, in passing any law by the general assembly of Ohio; nor is a vote of the people required in any case for an act passed by it to go into effect.

Art. II, Secs. 1, 1c.

The Act of May 27, 1915, was passed without even being petitioned for, and it went into effect at once by virtue of Sec. 4, Art. I, Con. of the U. S.; also as expressly provided in Section 16, Art. II, Con. of Ohio. The

1913 Act passed and became a law as did the 1915 Act, without the people having anything to do towards its passage, or its going into effect. (It is now claimed to be in full force.) If power was attempted to be given the "popular will," or the people, to **approve or veto** a bill passed by the **legislature** of Ohio as is given the Governor (Sec. 16, Art. II) there might be some shadowy ground for claiming the "popular will" as a part of the legislature. It is, however, held that a Governor, having the power to veto bills, is no part of the legislature that pass them.

Brooks v. Fischer, 21 Pec. Rep. 462-3.
See Brief, (Ohio S. C.) 28.
State ex rel. v. Marlow, 15 O. S. 114, 133-5.
State ex rel. v. O'Brien, 47 O. S. 470, 473.
State ex rel. v. Ganson, 58 O. S. (323).
And see Brief (S. C. O.) Pp. 27-28

As well might it be said that a **court** having the right to declare a law unconstitutional was a part of the legislature that passed it.

If it could be claimed that there are two legislative authorities in Ohio, one the usual legislature composed of a Senate and House, and another by referendum vote, neither authority participating in the proceedings of the other, still there can be no doubt but what there is but one "**legislature**" empowered to act under Sec. 4, Art. I, Con. of the U. S.

"Popular will" or referendum was unknown at the time of the framing (1787) and adoption of the Constitution of the United States. Referendum legislation was not then, or ever, a mode of legislation even in a democracy. Popular assemblies of the male population sometimes passed laws, for town and local purposes—never for States.

There, necessarily, can be but one legislature of a State, and especially as empowered by Sec. 4, Art. I, Con. of the U. S., to prescribe the "times, places and manner" of electing Representatives. (223 U. S. 120).

"Legislatures are the creatures of the Constitution. They owe their existence to the Constitution."

Luther v. Borden, 48 U. S. (7 How.) 66
Vanhorne's lessee v. Dorrance, 2 Dall. 398.
Vattel, ch. 3, Sec. 34.

If it be said that petition to the general assembly may initiate the right of the people to separately pass a law by referendum vote, it still remains a fact that if not passed or no action is taken thereon within four months, such vote alone might pass the desired law, without the general assembly's participation in any way, and it would become a law without the legislature having any part in it or its being submitted to the Governor.

Con. of Ohio, Art. II, Sec. 1b.

There is no special provision for its ever being repealed or superseded; certainly none by the General Assembly.

'The style of all laws submitted by initiative and supplemental petition shall be:
'Be it enacted by the **People** of the State of Ohio.' "

Con. of Ohio, Art. II, Sec. 1g.

And it is provided that:

"The style of the laws of this State shall be: 'Be it enacted by the General Assembly of the State of Ohio.' "

Con. of Ohio, Art. II, Sec. 18.

This styling of laws seems to determine, if there was otherwise doubt, that the general assembly of Ohio constitutes, alone, its legislature.

And, see Brief, (O. S. C.) p. 7.

Petition is not new in Ohio or in the United States. It is not referendum or legislation. The right of petition is incident to a representative, a republican form of government. The constitutions of Ohio and United States each, throughout their existence, has granted the right to petition its legislative body "for the redress of grievances."

Con. of Ohio, Art. I, Sec. 3.
Con. of United States, Art. I, (amdt.)

(Definition of Legislature.)

In the opinion (R. 24) **Dictionaries** are quoted defining "legislature," a body

"Invested with power to make, alter and repeal laws"—"to make laws or rules for the **community** represented by them."

These definitions are not questioned. Under the first one, the "body" must be invested with the right to do three things—"**make, alter and repeal laws**" to constitute a legislature at all. Under the other, "to make laws or rules" for those they represent—those who elected them.

How does Ohio referendum become a part of such **body** under either definition? A vote of the people had nothing to do with making the law in question, or any law. They do not participate in making, altering or repealing any law, and they never, by vote, act in a representative capacity. If the Constitution of Ohio gives the people authority to "make, alter or repeal laws," it is independent of the legislature—not a part of it.

Con. of Ohio, Art II, Secs. 1b, 1e, 1g.

REFERENDUM—NOT FOR APPROVAL OF LAWS.

The second syllabus, though a misstatement of what is requisite under Ohio referendum, is only another way of saying that a referendum vote, as provided in the Ohio constitution, may be used to reject a law of the State legislature duly passed, prescribing "the times, places and manner" of electing representatives in congress.

It, however, rightfully recognized two independent powers, each enacting laws separately, not together. It is patently erroneous to say that

> "If a congressional redistricting act, passed by the general assembly and lawfully submitted to a referendum for popular vote * * fails of approval by a majority of those voting on the same, such act is invalid and inoperative."
>
> Record, p. 20.

Instead of regarding the legislature, as does syllabus ‡I, as including referendum, syllabus ‡2 regards the Act as passed by the legislature alone and thereafter repealed by referendum. Referendum is not, as just shown, necessary to a redistricting act going into effect even under the Constitution of Ohio, and certainly not nuder the Constitution of the United States. The power to prescribe the manner of electing representatives in Congress being alone derived from Sec. 4, Art. I, Constitution of the United States, of course its acts in the premises go into effect at once. It sufficiently appears that a State legislature, in thus prescribing, derives its power solely from the Con. of the U. S.

Supra. pp.....
And see: Brief, (S. C. O.) pp. 10-11. 16-18, 23-28. 42-48.

(Legislature—How Constituted.)

In the court's opinion it is said that:

> "While the legislative power has been delegated to the bi-cameral body composed of the senate and house of representatives, the people of Ohio have by * * provisions of their constitution determined the **manner** by which such legislative power may be exercised, under what circumstances the laws passed by it may become operative without an appeal to the people, and have further imposed the conditions under which such laws may become operative or inoperative as they may have been adopted or rejected by the popular vote designated as the referendum."
>
> Record, p. 23.

The foregoing statement affirms that the Ohio constitution has expressly provided that a senate and house of representatives shall constitute its legislature with authority to pass laws, yet the people of Ohio have withheld from it the right to pass a law without their subsequent right, by petition and vote, to delay its going into effect, and to reject it, notwithstanding the Constitution of the United States grants to the legislature an absolute right to legislate on the subject. The people of Ohio never possessed any right relating to the election of representatives in congress to reserve.

If the power to prescribe the "times, places and manner" of electing representatives to Congress may be taken away from the legislature or controlled by State constitutions then that which is thus assumed may have force.

The authorities are practically unanimous as to such power. That a petition or popular vote is no part of the legislature of Ohio should be conceded; that neither par-

ticipate in enacting laws by the legislature is absolutely clear. Petition and referendum vote can, under Ohio's constitution, be used only to reject laws **after** passage. It is worse than misleading to say that laws enacted in Ohio

> "become operative or inoperative as they may have been adopted or rejected by the popular vote."

No law of the Ohio legislature requires, before taking effect, a vote of any kind by the people either under the constitution of the state or United States. No argument is needed to show that an agency that has no part in enacting a law is no part of the legislature that enacts it. A mere rejecting power is not a creating power.

III

(Apportionment Act (1911) Did Not Supersede the Constitution of the United States.)

Syllabus **three** forces us to the conclusion that the court regarded the foregoing propositions as mere abstraction, having little or nothing to do with the determination of this case; that it is alone determinable on the supposed "grant of power" to be found in the apportionment act of Congress of August 8, 1911, treating it as superseding the grant of power in the Constitution of the United States; and going one long step in advance by authorizing legislatures to make re-districting laws which are subject to be rejected by referendum, although the Constitution of the United States otherwise provides.

This syllabus (3) assumes that:

> "Under the latter clause of Section 4, Article I of the United States Constitution, complete and plenary power over State legislation enacted thereunder

> rests in the Federal Congress, and its laws supersede all State regulations upon the same subject."
>
> Record, p. 20.

There is no possible authority in that clause for saying there exists anywhere "plenary power" over "State legislation enacted" under said Section. No authority of courts, Congress, statesmen or law writers has been found supporting such fallacy, but much to the contrary; the language used in the clause does not warrant the conclusion. It does provide that

> "Congress may at any time **by law** make or alter such regulations, except as to the place of choosing senators."

Not a word is said about Congress authorizing or regulating legislatures to pass a law of any kind or in any manner or with the aid of other agencies or subject to any agency's right to reject or veto it.

(No agency participated with the legislature in passing the law in question.)

Chief Justice Waite belittles the question of Congress having a right to interfere with state laws authorized to be enacted by their legislatures.

He adds that

> "The power of the state in this particular is certainly supreme until Congress acts."
>
> Minor v. Happersett, 88 U. S. (21 Wall) 171

Congress must always, as the clause provides, act "**by law**" in making or altering the regulations of a State on the subject; it cannot, "by law", authorize a State legislature to act in a particular manner, or to act with outside agency authorized to reject its action.

That Congress must, itself, make or alter, **by law**, acts of legislatures, and cannot require state legislatures to

provide in a particular way for electing representatives, is settled by this court.

Ex parte Seibold, 100 U. S. 371, Syl. 8.
And see opinion of Justice Bradley speaking for the court, pp. 383-4.

And Justice Field, for the minority of the court, concurred on this point.

2 Hind's Prec. Sec. 247, p. 240.

The clause presupposes Congress will, by law, make regulations to take the place of or to alter such regulations as State legislatures have made. How could Congress alter legislation not existing?

The court treated the clause as authorizing Congress to, in advance, require legislatures of states to make redistricting laws of a particular kind, and always subject to be rejected and never going into effect. The effect of this would be to provide an agency which may prevent legislatures from passing any re-districting act at all. If the court's view is sound, Congress has power to provide what shall constitute state legislatures, and that they may be constituted wholly different from the legislatures referred to in the Constitution of the United States.

Senator Stephen A. Douglas, in a celebrated contested election case, made a majority report which involved the power of Congress.

"to instruct the State legislatures in respect to the **manner** in which they shall perform their duties."

It reads in part:

"We have searched the Constitution in vain for such power."

* * * * * *

"The power of the States, in this respect, is as absolute and supreme as that of Congress, subject to

the provision that **Congress may change or suspend their action, by substituting its own in lieu thereof.**"

"Whatever power the legislatures possess over elections, they **derive from the Constitution,** and not from the laws of the United States. Congress has no more authority to direct the form of State legislation than the States have to dictate to Congress its form of action. Each is **supreme** within the sphere of its own peculiar duties; clothed with the power of legislation, and a discretion as to the manner in which it shall be exercised, with which the other cannot interfere by ordering it to be exercised in a different manner."

1 Bart. Con. Elec. Cases, p. 52.

In this opinion, in a report in the same case, Senator Garrett Davis (Ky.) concurred (as did the whole committee and the Senate) using equally strong language.

For quotations from both reports,
See Brief (S. C. O.) pp. 42-43.

We refrain from freely commenting on the attempt in the opinion to find authority in remarks of a distinguished Senator, while the 1911 apportionment act was being considered, for now regarding the law passed as setting aside the plain provisions of the Constitution of the United States.

Record, pp. 25-6.

The remarks were most probably made by the Senator (not a lawyer) without previous thought or examination. He characterized the bill as "**bad**", unless amended, because it provided for redistricting only one way—that is, the way authorized by the Constitution—by the legislature. He used this language:

"Do it only one specified way; that is by your **legislature,**" wheras, if his amendment was adopted,

authority would be given to "proceed and district your State in accordance with your laws."

Record, p. 26.

That is, redistrict the State as, and in the manner, the laws of the State authorize, subject to not doing so at all, through referendum, which may wholly set aside the absolute right to legislate on the subject as the Constitution of the United States provides.

(Ohio had no law relating to redistricting.)

And a referendum vote is not even required to prevent a legislature from redistricting for ninety days before a regular Congressional election. A law for the purpose, if referendum applies, would not go into effect if passed within ninety days of such election.

Con. of Ohio, Art. II, Sec. 1c.

And such vote is not required if such law were passed seventeen months before such election, provided only six per cent of those voting for Governor at the last preceding election petitioned for a vote on the law.

Con. of Ohio, Art. II, Sec. 1c, 1g.

This feature of referendum we have reviewed in our Brief (S. C. O.) pp. 6-9.

The notable thing, however, is that the provision in the 1911 apportionment Act, provides that states "**should be redistricted in** the **manner provided by the laws thereof.**"

There was not then, theretofore or since, any law, of any kind, in Ohio, or even a Constitutional provision providing the **manner of redistricting** the state, and there never has been.

We suggest, with proper deference, that a law of a state providing the **manner** it should legislate in the

future on a particular subject would not only be void but absurd.

The provision in the 1911 apportionment Act assumed to require legislatures to redistrict states for the election of representatives according to the laws of the states, was based on a mistake of fact as to the existence of such laws and, on the assumption that, if existing, they would be valid and controlling for that purpose.

We are unable to find any constitution of the now forty-eight states that contains any provision fixing the manner of redistricting by its legislature for representatives. So as to their laws.

The matter of so providing was brought up, we find, long ago (1820) by resolution, in a convention to revise the Constitution of Massachusetts. Justice Joseph Story (a member of the convention) who had recently before (1816) written the unanimous opinion of this court covering the question, declared the resolution:

> "Assumes control over the legislature which the Constitution of the United States does not justify. It (the legislature) is bound to exercise its authority according to its own views of public policy and principle; and yet this proposition compels it to surrender all discretion." &c, &c.

Another member of the convention of some note as a constitutional lawyer, Daniel Webster, followed him, saying:

> "Whatsover was enjoined on the legislature by the Constitution of the United States, the legislature was bound to perform, and he thought it would not be well by a provision of this constitution to regulate the mode in which the legislature should exercise a power conferred on it by another constitution."
>
> I Hinds' Prec. p. 653.

This ended the effort to supplant the constitution of the union by the constitution of a state.

> We hav referred to this subject and made fuller quotatio. in our .... Brief (S. C. O.) pp. 16-17.

In the case just referred to, Justice Story uses this language:

> "The language of the Constitution is imperative as to the performance of many duties. It is imperative on the State legislatures to make laws prescribing the times, places and manner of holding elections for senators and representatives, and for electors of president and vice president."
>
> Martin v. Hunter, 1 Wheaton, 304.

If a state constitution cannot take from a state legislature a grant of power given by the Federal Constitution, how could state laws, (if there were such) or other authority, take away such power?

It is notable that if the 1911 apportionment Act may be construed as directing state legislatures to make lawe of a particular kind, such as to provide for electing representatives in congress by districts; that candidates shall be nominated in a particular manner, &c., such legislation has no warrant.

Since the famous election cases (1843) of the New Hampshire, Georgia, Mississippi and Missouri members it has been understood as practically settled that congress had no such power.

The question was whether those claiming seats by virtue of an election on a **general ticket** were duly elected, the apportionment act (1842) providing that representatives

> "Shall be elected by districts composed of contiguous territory."

The committee on elections was (Dec. 20, 1843), by resolution of the House, directed to

> "inquire and report whether the several members * * * have been elected in conformity with the constitution and law."

It had heretofore (1842) declared members entitled to seats although laws of Congress required their election by districts.

Mr. Douglas of Illinois, for the Committee, (March 15, 1844) submitted a report recommending the adoption of resolutions reading:

> "Resolved, That the second section of "An act for the apportionment of representatives among the several states, according to the sixth census," approved June 25, 1842, is not a law made in pursuance of the Constitution of the United States, and valid, operative, and binding upon the states.
>
> Resolved, that all the members of this House (excepting the two contested cases from Virginia, upon which no opinion is hereby expressed) have been elected in conformity with the Constitution and laws and are entitled to their seats in this House."

There was a conflict between the authority of Congress and the legislatures of the states, arising over the former undertaking to require the latter to prescribe the manner, etc., of electing representatives.

The report concludes:

> "that the convention which formed and the people who ratified that great charter of our liberties intended that the regulation of the times, places, and manner of holding the elections should be left exclusively to the legislatures of the several states, subject to the condition, only, that Congress might alter the state regulations, or make new ones in the event that the states should refuse to act in the premises, or should legislate in such a manner as

would subvert the rights of the people to a free and fair representation."

The report is highly instructive on the history of Section 4, Article I of the Constitution; also on how Congress must exercise the power given it by such section and why it possessed no power

> "to compel state legislatures to change laws or make new ones," and that "Congress might not direct the form of state legislation, or require enactments to be made in compliance to prescribed forms.'"

The form of the resolutions submitted was changed, but not their substance; and then adopted. and the members from each of the states were declared duly elected.

> For some history of these cases,
> See: 1 Hinds' Prec. pp. 170-3, Sec. 310.

This court has held, unanimously, that state legislatures, by virtue of Clause 2, Sec. 1, Art. II, Con. U. S.,

> "have exclusive power to direct the **manner** in which the electors for president and vice-president shall be appointed."

The power thus conferred is substantially the same as that conferred on legislatures by Sec. 4, Art. I, Con. U. S.

> McPherson v. Blacker, 146 U. S. 1, 33-36.

There have been cases of some doubt arising over the proper district in which to elect representatives when vacancies have occurred **after** an act was passed changing the boundaries of districts.

It seems to have been uniformly held that a legislature had the right to pass, as often as it chose, a districting bill to go into effect at once and for all future elections. The contested election case (1850) of Perkins v.

Morrison (N. H.) is one of this class. Morrison, elected from the new and changed district, was seated. The committee report covers a good general discussion of the right of legislatures to prescribe "times, places and manner" of electing representatives, uncontrolled by congress, &c.

I Hinds' Prec. pp. 173-4.

The case of Pool v. Skinner (N. C., 1884) is like the preceding one, and the report thereon is also instructive.

I Hinds' Prec. 175-180.

It remains to say that neither the Constitution of the United States or State of Ohio undertakes to vest power in the legislature to make such laws as it chooses on any subject. It is provided in the Constitution of Ohio that

> "The election and appointment of all officers, and the filling of all vacancies not otherwise provided for by this Constitution or the Constitution of the United States, shall be made in such manner as **may be directed by law.**" Art. II, Sec. 27.

This Ohio provision recognizes constitutional power as exclusive under the Constitution of the United States whenever it speaks.

This question of the power of Congress to direct State legislatures has frequently been decided.

Richardson v. McChesney, 128 Ky. 363.
And see on the subject:
Reply Brief (S. C. O.) pp. 3-9.

If the apportionment act had (as it did not) undertaken to authorize state legislatures to prescribe **by law** the manner of electing representatives, it would have meant nothing, as they already had that authority. If

such act had provided that state legislatures should so prescribe only on condition that their laws were not rejected by a popular vote (referendum) the provision would be **void** as that would have given them only conditional power to legislate effectively on the subject.

If such act provided no redistricting law of a legislature should take effect unless approved by a referendum vote of the people of the State, it would also have been **void,** because violative of the Constitution of the United States.

Suppose such act had provided that legislatures of States should have no right to pass any redistricting law during ninety days before a regular congressional election, to take effect before such election, it would obviously have been **void.**

This is exactly the effect of referendum under Sec. 1c, Art. II, Con. of Ohio.

If such Act provided that no redistricting act should be passed within seventeen months of such election to go into effect within that time, provided six per centum of those voting for Governor at the preceding election petitioned for a vote thereon, the provision would be **void,** because violative of constitutional power. Whatever could not be done directly could not be done indirectly. But, as we have seen, the act undertook to grant no power to legislatures to the **manner** of prescribing for the election of representatives in congress, and, mistakenly, undertook to confer on legislatures the right to pass laws in the manner existing state laws permitted, and there were no such laws.

Finally, it would follow, if the apportionment Act did declare, as the state court seems to hold, that state **legislatures** are authorized to form districts **"in the manner provided by the laws thereof"**, that referendum would be excluded thereby, as it is a provision of the **Constitution** of Ohio.

In the court's opinion it is said:

> "In disposing of the case Chief Justice Fuller said:
>
> "The legislative power is the supreme authority except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature unless by the fundamental law, power is elsewhere reposed.
>
> Record, p. 25.

The fundamental law referred to was the Constitution of the United States, and "no power is elsewhere reposed" by it, or the people. This quotation is found in an early part of the Chief Justice's opinion, not in "disposing of the case."

It would have been illuminative to have given us the short sentence immediately preceding the one quoted, reading:

> "The State does not act by its people in their collective capacity, but through such political agencies as are constituted and established."

Also a sentence closely following that quoted:

> "The clause under consideration does not read that the people or the citizens shall appoint, but that each state shall, &c."

And again:

> "The prescription of the written law cannot be overthrown because the States have latterly exercised in a particular way a power which they could have exercised in some other way."
>
> Supra, 146 U. S. (36).

Chief Justice Fuller had before spoken plainly, defining the sovereign power of the people in our republican form of government, to

> "pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves," &c.
>
> In re Duncan, 139 U. S. (161)

KEIFER & KEIFER,
SHERMAN T. McPHERSON,
Attorneys for Plaintiff.

INDEX.

Argument.

I.

II.

III.

IN THE

Supreme Court of the United States

October Term 1915.

No. 987.

THE STATE OF OHIO ON RELATION OF DAVID DAVIS,

Plaintiff in Error,

vs.

CHARLES Q. HILDEBRANT, SECRETARY OF STATE OF OHIO, STATE SUPERVISOR AND INSPECTOR OF ELECTIONS AND STATE SUPERVISOR OF ELECTIONS, ET AL.

BRIEF OF DEFENDANTS.

STATEMENT OF CASE.

The sole question in this case is whether an act by a state to redistrict the state for the purpose of holding elections for representatives to Congress is to be enacted in the same manner as other state laws. Concretely: Is such an act passed by the legislature of the state of Ohio subject to referendum provided for in Article II of the Constitution of Ohio?

On account of the shortness of time counsel for relator have not been able to get a copy of their brief to us prior to our preparing this one, but we have been assured that the brief in this court will follow the same lines as the one in the state court.

As meeting all of the arguments set forth in their brief in the state court we respectfully submit two propositions for which we contend, viz:

1. The words "by the legislature thereof," as used in Section 4 of Article I of the Constitution of the United States, refer to the **legislative power of a state as fixed by the state constitution.**

2. Congress has acted under said Section 4 of Article II, and in the act of August 8, 1911, (U. S. Comp. Stat. 1913, Volume 1, Title 2, Chap. II, Section 18) has deliberately and for the purpose of leaving no question about such state legislation being subject to the referendum in states having a referendum, changed the words "by the legislature thereof in the manner herein prescribed," which had been the law down to that time (Section 4 of the act of January 16, 1901, U. S. Comp. Stat. 1901, Vol. I, Chap. II, Section 20, Subsection 4), to "in the manner provided by the laws thereof and in accordance with the rules enumerated in Section 3 of this act." (See amendment offered in senate of Sixty-second Congress: Congressional Record(Vol. 47, Part 4, page 3436; passed, p. 3556.)

The decision herein calls for an interpretation of:

(1) Section 4, Article I of the Constitution of the United States which provides as follows:

> "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter

such regulations, except as to the places of chusing senators."

(2) Section 1 of Article II of the Constitution of Ohio, as amended September 3, 1912, which provides as follows:

"The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly except as hereinafter provided, and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws."

Section 1c of Article II of the Constitution of Ohio, as amended September 3, 1912, provides as follows:

"The second aforestated power reserved by the people is designated the referendum, and the signatures six per centum of the electors shall be required upon a petition to order the submission to the electors of the state for their approval or rejection, of any law, section of any law or any item in any law appropriating money passed by the general assembly. No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided. When a petition, signed by six per centum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state within ninety days after any law shall have been filed by the governor in the office of the secretary of state, ordering that such law, section of such law

or any item in such law appropriating money be submitted to the electors of the state for their approval or rejection, the secretary of state shall submit to the electors of the state for their approval or rejection such law, section or item, in the manner herein provided at the next succeeding regular or general election in any year occurring subsequent to sixty days after the filing of such petition, and no such law, section or item shall go into effect until and unless approved by a majority of those voting upon the same. If, however, a referendum petition is filed against any such section or item, the remainder of the law shall not thereby be prevented or delayed from going into effect."

(3) And the following federal statutes:

The act of August 8, 1911, Chapter 5, Section 3: (U. S. Comp. Stat. 1913, Vol. I, Title 2, Chap. II, Sec. 17.)

"In each state entitled under this apportionment to more than one representative, the representatives to the sixty-third and each subsequent Congress shall be elected by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of representatives to which such state may be entitled in Congress no district electing more than one representative."

Section 4 of the same chapter of the same act provides:

"In case of an increase in the number of representatives in any state under this apportionment such additional representative or representatives shall be elected by the state at large and the other representatives by the districts now prescribed by law until such state shall be redistricted in the manner provided by the **laws thereof** in accordance with the rules enumerated in Section 3 of this act; and if there be no change in the number of representatives from a state, the representatives thereof shall be elected from the districts now prescribed by law until such state shall be redistricted as herein prescribed."

Section 5 of said act provides:

> "Candidates for representative or representatives to be elected at large in any state shall be nominated in the same manner as candidates for governor, **unless otherwise provided by the laws of such state.**"

Section 25, R. S. U. S. (U. S. Comp. Stat. 1913, Vol. I, Title 2, Chap. II, Section 21,) provides:

> "The Tuesday after the first Monday in November in the year 1876 is established as the day in each of the states and territories of the United States for the election of representatives and delegates to the Forty-fifth Congress; and the Tuesday after the first Monday in November in every second year thereafter is established as the day for the election in each of the said states and territories of representatives and delegates to Congress, commencing on the fourth day of March next thereafter."

Section 27, R. S. U. S. (U. S. Comp. Stat. 1913, Vol. I, Title 2, Chap II, Sec. 24,) provide:

> "All votes for representatives in Congress must be by written or printed ballot or voting machine the use of which has been duly authorized by the state law; and all votes received or recorded contrary to this section shall be of no effect."

The last apportionment of representatives made by Congress was in the act of August 8, 1911, Chapter 5, Sec. 1. (U. S. Comp. Stat. 1913, Vol. 1, Title 2, Chap. II, Sec. 15.)

ARGUMENT.

I.

Taking up first Section 4 of Article I of the Federal Constitution let us attempt by the process of elimination to ascertain its intent. Let us find out first what it does not mean. A simple way of making such an investigation is by questions and answers.

Does said Section 4 of Article I authorize the **legislative body** of a state to prescribe the time, place and manner of holding elections or is the authority delegated to the members of such legislative body? Clearly the answer is that the authority is given to the legislative body as a body rather than to the members as members.

Then arises the question:

DOES THE LANGUAGE OF SAID SECTION REFER ONLY TO A BICAMERAL BODY?

Counsel may argue that because Section 2 of Article I of the Federal Constitution refers to the most numerous branch of the state legislature, a legislative body consisting of two branches was referred to in Section 4. But when we stop to consider that both at the time of the adoption of the Federal Constitution as well as subsequent thereto there existed different types of legislatures, such argument falls. The Continental Congress consisted of but one body. The colonies presented several different types of legislatures. Pennsylvania, Georgia and Vermont adopted the scheme of a single body as the depositary of legislative power.

> "It has been already stated that Pennsylvania in her first constitution adopted the scheme of a single

body as the depositary of the legislative power, under the influence, as is understood, of a mind of a very high philosophical character. Georgia also is said in her first constitution, (since changed), to have confided the whole legislative power to a single body. Vermont adopted the same course giving however to the executive council a power of revision and of proposing amendments to which she still adheres."

(Story Commentaries on the Constitution, Volume 1, Section 548, page 408).

The following is a note to be found in Bryce on the American Commonwealth, Volume 1, Part 2, Chapter XL, page 484:

"It deserves to be remarked that the Pennsylvania constitution of 1786, the Georgia constitution of 1777 and the Vermont constitution of 1786 and 1793, **all of which constituted one house of legislature only,** provided for a second body called the executive council, which in Georgia had the duty of examining bills sent to it by the House of Assembly, and of remonstrating against any provisions they disapproved, and in Vermont was empowered to submit to the assembly amendments to bills sent up to them by the latter, and in case the assembly did not accept such amendments, to suspend the passing of the bill till the next session of the legislature. In 1789 Georgia abolished her council and divided her legislature into two houses; Pennsylvania did the same in 1790; Vermont in 1836. Both Pennsylvania and Vermont had also a body called the Council of Censors, who may be compared with the Nomothetae of Athens, elected every seven years, and charged with the duty of examining the laws of the state and their execution, and of suggesting amendments. This body was abolished in Pennsylvania in 1790, but lasted on in Vermont till 1870."

The following is taken from the text of Story on the Constitution, Section 560, page 416:

"In the convention which framed the constitution, upon the resolution moved, 'that the national

legislature ought to consist of two branches,' all the states present, except Pennsylvania, voted in the affirmative. At a subsequent period however seven only of eleven states present voted in the affirmative. three in the negative and one was divided. But although in the convention this diversity of opinion appears, it seems probable that ultimately when a national government was decided on, which should exert great controlling authority over the states, all opposition was withdrawn, as the existence of two branches furnished a greater security to the lesser states. **It does not appear that this division of the legislative power became with the people any subject of ardent discussion or of real controversy.** If it had been so, deep traces of it would have been found in the public debates instead of a great silence. The Federalist touches the subject in but few places, and then principally with reference to the articles of confederation and the structure of the senate."

In the ordinance of 1787 in Section 11 thereof Congress provided: (Continental)

"The general assembly or legislature shall consist of a governor, legislatve council and a house of representatives. The legislative council shall consist of five members to continue in office five years unless sooner removed by Congress; any three of whom to be a quorum: and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together and when met they shall nominate ten persons resident in the district and each possessed of a freehold in five hundred (500) acres of land and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid."

This legislative provision was clearly patterned after one of the colonial types.

The only reasonable conclusion to the last suggested question is that Section 4 of Article I was meant to em-

brace whatever legislative body might be provided for by the constitution of the particular state.

Another question suggests itself:

WAS SECTION 4 OF ARTICLE I MEANT TO REFER ONLY TO A REPRESENTATIVE BODY?

Helpful in this connection are the answers to two subsidiary questions:

(a) How was the "legislature thereof" to prescribe the time, place and manner of holding elections?

To this question the only reasonable answer that may be given in the light of practice as well as reason is that the "legislature thereof" was to act as it did in other legislative matters by enacting a law. We have been unable to find that any attempt was ever made by a legislature to prescribe any of these things otherwise than by law. In the Act of Congress of August 8, 1911, under Section 4 of Article I of the Constitution Congress recognizes therein that the districting of a state is to be provided and prescribed by law.

Then will arise the second subsidiary question:

(b) Is such legislation subject to the check of the governor's veto?

Search through the reports fails to disclose that the governor's right to veto such legislation was ever questioned. It becomes the duty then to accept the interpretation in practice placed upon this matter since the inception of the Federal Constitution. If then these two subsidiary questions be correctly answered it must become quite patent that the "legislature thereof" was to act as it did in other cases by enacting laws in the regular manner prescribed by the state constitution for the enactment of laws.

The answer then to the main question last above suggested is that Section 4 of Article I of the Federal Constitution refers to the power in the state which exercises the function of legislation; and we are to look to the constitution of the state to find where is lodged the legislative power.

A search through the reports of the courts of last resort show but one case which is really in point, that being the case of State of South Dakota, ex rel. John F. Schrader vs. Samuel C. Polley, as secretary of state, reported in 26 S. D. at page 5 and in 127 N. W. at page 848. The following statement of the case is copied from the report of the attorney general of South Dakota for 1909-1910 at page 34:

> "This was an original proceeding in the State Supreme Court for a writ of mandamus to compel the defendant to certify to the several county auditors the question of nominating congressional candidates by districts. Under the provisions of Chapter 223 of the Session Laws of 1909 the state was divided into two congressional districts. However, the provisions of the referendum law were invoked and a petition was filed to refer this law to the voters of the state. The question involved in this case was the right of the electors of the state to suspend the operation of such law pending a popular vote on the question. The petition for writ of mandamus was denied, the court holding that the provisions of the referendum applied as well to this as to any other law."

In the course of the opinion the court said:

> "We are also of the opinion that the word 'legislature' as used in Section 4, Article I, of the Federal Constitution, does not mean simply the members who compose the legislature, acting in some ministerial capacity, but refers to and means the law-making body or power of the state, as established by the state constitution, and which includes the whole constitutional law-making machinery of

the state. * * * Under the constitution of this state, the people, by means of the initiative and referendum, are a part and parcel of the law-making power of this state, and the legislature is only empowered to act, in accordance with the will of the people as expressed by the vote, when the referendum is properly put in operation. The term 'legislature' has a restricted meaning which only applies to the membership thereof, and it also has a general meaning which applies to that body of persons within a state clothed with authority to make the laws (Bouvier's Law Dic.; Webster's Dic.; 18 Am. & Eng. Ency., 822; 25 Cyc., 182), and which, in this state, under Section 1, Article 3, Const. S. D., includes the people. Therefore we are of the opinion that in the passage of this act dividing the state into two congressional districts, by the law-making power of this state, it was necessary that such law be pasesd according to the contitutional provisions of this state, and that the referendum was applicable thereto."

In the brief of counsel for relator in the state court reliance was placed upon the case of McPherson v. Blacker, 92 Mich., 377, and the same case in the United States Court, 146 U. S., 1.

It is respectfully submitted that there is nothing in the decisions of these cases nor in the opinions of the courts which is inconsistent with our claims in the case at bar. All that was held by the Supreme Court of the United States and by the Supreme Court of Michigan was that the question was one for the legislature. Neither of these courts attempted to define either the legislature or legislative power.

As said by Justice Cooley in the case of Bay City vs. State Treasurer, 23 Mich., 499, constitutions "in the main only undertake to lay down broad general principles," and that the court should not, in order to aid evasions and circumventions, resort "to a literal and technical construction, as if they were great public enemies standing in the way of progress * * * *"

Only by a strained, unnatural construction could it be held that Section 4 of Article I of the Federal Constitution refers to the members of the legislature rather than to the legislative power of the state. As said Section 4 undoubtedly refers to the legislative power of the state we must look to the constitution of the state to find the definition of that legislative power. In Ohio this is found in Section 1 of Article II of the State Constitution, as amended September 3rd, 1912.

2.

Under the provision of Section 4 of Article I of the Federal Constitution "but the Congress may at any time by law make or alter such regulations, except as to the places of chusing senators," Congress from time to time since 1842 has enacted apportionment election laws which provided that the state should be divided into contiguous and compact territory. (5 Statutes at Large, 491; McPherson v. Blacker, 146 U. S., p. 1-26.)

In the act of February 7, 1891, (17 Statutes at Large, 28), there was a provision that "election of representatives to the Forty-third Congress * * * shall be elected by the districts as now prescribed by law in said state unless the legislature of said state shall otherwise provide * * *."

In the act of February 7, 1891, (26 Statutes at Large, 735) the following language was first used:

> "And other representatives by districts now prescribed by law until the legislature of such state in the manner herein prescribed shall redistrict such state."

This same language was carried into Section 4 of the act of January 16, 1901, which act immediately preceded the present act of August 8, 1911. Section 4 of that act

provided (U. S. Comp. Stat. 1901, Vol. I, Chapter 2, Section 20, Subsection 4):

> Sec. 4. "That in case of an increase in the number of representatives which may be given to any state under this apportionment such additional representative or representatives shall be elected by the state at large, and the other representatives by the districts now prescribed by law until the **legislature of such state in the manner herein prescribed, shall redistrict such state**; and if there be no increase in the number of representatives from a state the representatives thereof shall be elected from the districts now prescribed by law until such state be redistricted as herein prescribed by the legislature of said state; and if the number hereby provided for shall in any state be less than it was before the change hereby made, then the whole number to such state hereby provided for shall be elected at large, unless the legislatures of said states have provided or shall otherwise provide before the time fixed by law for the next election of representatives therein."

When it came to the enactment of the act of August 8, 1911, (the present statute) after considerable debate in both the house and senate the words "by the legislature thereof in the manner herein prescribed," which had been carried in the law since 1891, were stricken out and in lieu thereof there were inserted the words "in the manner provided by the laws thereof and in accordance with the rules enumerated in Section 3 of this act."

This amendment was for the declared purpose of making acts of the legislature redistricting the states (commonly called gerrymander acts) subject to the referendum provisions of the various state constitutions.

The foregoing amendment was offered in the senate by Mr. Burton of Ohio on August 1, 1911. (Congressional Record, Sixty-second Congress, Vol. 47, Part 4, page 3436).

In offering this amendment Senator Burton said: (Vol. 47, Part 4, Congressional Record, page 3436)

Mr. Burton: * * *

"The other amendment which I have proposed requires perhaps a somewhat more extended explanation. It is this: On page 4, line 15, after the word 'redistricted,' strike out the words 'by the legislature thereof in the manner herein prescribed,' and insert in lieu thereof the words:

> In the manner provided by the laws thereof and in accordance with the rules enumerated in Section 3 of this act.

This amendment pertains to the dividing of the several states into districts and to the manner in which this shall be done. Section 3 contains this clause:

> That in each state entitled under this apportionment to more than one representative, the representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants.

The next section—Section 4—provides that representatives "shall be elected from the districts now prescribed by law until such state shall be redistricted by the legislatures thereof in the manner herein prescribed." "The manner herein prescribed" means that the district shall be composed of contiguous and compact territory and contain as nearly as practicable an equal number of inhabitants, as expressed in the prior section.

I desire to call attention to the fact that as the bill passed the house in the preceding Congress it did not contain this clause or expression, "by the legislature thereof."

Mr. President, whatever our views may be on the subject of the initiative or referendum we cannot ignore

the existence of statutes in divers states of the Union under which they are the recognized methods of enacting laws. Under such circumstances what is the effect of this expression, "by the legislature thereof"? It is a distinct and unequivocal condemnation of any legislation by referendum or by initiative. It is a mandate to the states to this intent: Whatever your laws may be for the enactment of statutes, yet in the division of the state into congressional ditricts you must act by the legislature alone, even if under the laws a trivial question can be submitted to the whole electorate, nevertheless in this very important matter of dividing the state into districts the legislature alone shall have full authority.

At first sight, in reading this section and finding the words "by the legislature thereof," it would seem to be an oversight. Whether it is or not, I am unable to say; but in any event it does not belong here. A due respect to the rights, to the established methods, and to the laws of the respective states requires us to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes.

* * * * * *

If you have a referendum in a state the object of which is to submit to the people at large the question of whether or no a statute shall stand, the question whether it is just or unjust, that provision ought especially to apply to a law dividing a state into districts, where there is such an opportunity for monstrous injustice. If there is any case in the whole list of laws where you should apply your referendum, it is to a districting bill.

Senators on the other side, and on this side as well, have of late addressed the senate ardently advocating the principle of the referendum and the initiative. I shall be interested to know whether they will permit the restriction, "by the legislature thereof," to remain in this statute. If you believe in the principle, stand by the principle and do not take that very inconsistent and ab-

surd position, "We are for the rule, but we are against the application thereof."

I take it the object sought by the amendment I have proposed could be secured by merely striking out the words "by the legislature thereof," but if it is to be amended I think it is desirable to make both the substituted and the folowing words more definite. So I have suggested that the senate strike out the words "by the legislature thereof in the manner herein prescribed," and insert in lieu thereof, first, the words "in the manner provided by the laws thereof." This gives to each state full authority to employ in the creation of congressional districts its own laws and regulations. What objection can be made to a provision of that kind? Pass this amendment, and you will transmit to each state the message "Proceed and district your state in accordance with your laws." This act does not do that. It sends the message, "Do it in only one specified way; that is, by your legislature."

On the following day, August 2, the debate was resumed in the senate (Vol. 47, Part 4, Congressional Record, page 3507).

Senator Burton speaking:

"I desire to repeat briefly the arguments for the first amendment that I proposed yesterday, namely, to strike out the words 'by the legislature thereof in the manner herein prescribed,' as a method for districting states, and to insert in lieu thereof the words: 'In the manner provided by the laws thereof and in accordance with the rules enumerated in Section 3 of this act.'

What right have we, Mr. President, in the face of different methods and laws pertaining to the enactment of legislation--some states acting by the legislature, others acting by the legislature but subject to a referendum—to fix one inflexible way and require that every state shall be divided into congressional districts in that manner."

Mr. Shively: "In that respect is it not a fact that this bill repeats substantially the language that has been em-

ployed in all reapportionment acts in all these years? **And if the senator will permit me further, is not the language sufficient to allow, whatever the law of the state may be, the people of that state to control the matter? If they have arranged that legislative action shall be submitted to a referendum, the phraseology of the pending bill does not interfere with that procedure.''**

Mr. Burton: ''Answering the last suggestion first, that if a state sanctions the use of the referendum this provision has no effect, I will ask why leave it in, then? I think it does have effect. Congress may determine the time, place and manner of electing members of the house of representatives.''

* * * * * *

Page 3508.

Mr. Burton: ''* * * In several states,—I was about to say in numerous states—the referendum has been adopted. It was very natural in 1890 and even in 1900 that a provision should be incorporated that the state should be redistricted 'by the legislature thereof' because that was the only law-making power; but since then a new method of making laws has been devised, and we cannot afford to cling either to obsolete phraseology, or, in our dealing with the states to adhere to obsolete methods; that is, to ignore their methods of enacting laws.''

Mr. Shively: ''Mr. President, it is not a matter of adhering to obsolete methods or dealing with obsolete phraseology. I am entirely willing that a state shall determine what shall be the rule of apportionment within that state, **but I still insist that the language of this bill does not prohibit the legislature from arranging the districts by referendum of the act to the people.''**

* * * * * *

Mr. Burton: ''* * * I will say to the senator from Indiana—and it is a point of some importance in this connection—that the bill which passed the house of representatives last winter and came over to the senate did

not contain the phraseology 'by the legislature thereof'. Those words have been inserted since.

It was determined last winter that the question should be left open to the laws and regulations of the respective states. Why, after it had been once passed by the house, was it thought best to put in this phraseology, 'by the legislature thereof'?"

* * * * * *

Mr. Clapp: **"Mr. President, I want to suggest to the senator from Ohio, in response to the suggestion of the senator from Indiana, that a legislature in a state where the initiative and referendum is in vogue would be derelict if it did not submit a matter to the referendum that, so far as my knowledge of the law relating to the initiative and referendum is concerned, the legislature absolutely has nothing to do with."**

Mr. Burton: "I am inclined to think that is the case in several states."

Mr. Clapp: "I know that is the case in some states. There is no question about that."

Mr. Shively: "In which event it could have nothing to do with this."

Mr. Clapp: "That is just the object of the amendment of the senator from Ohio."

Mr. Shively: "No."

Mr. Clapp: "To put it wherever it would be under the law of that state."

Mr. Shively: "If you have a referendum in the state that applies to general legislation adopted by the legislature of that state, and the law of that state requires that such legislation shall be submitted to a referendum, of course it applies here. * *"

Mr. Clapp: "The law of the state in that case does not require the legislature to submit anything to the people."

* * * * * *

Mr. Works: "The right of referendum in the people does not come from the legislature at all. The legislature has no power over it. They cannot delegate it to

the people. It must come from a constitutional provision; and the same is true with respect to the initiative. Legislative power in the hands of the people could only be given by a constitutional provision. Therefore, so far as the referendum is concerned, it is entirely independent of any action by the legislature, and if this provision is made in the way it appears in the bill at the present time, then as a matter of course the power would be given directly to the legislature."

Mr. Burton: "And no other regulation or law could be utilized."

Mr. Works: "I will say to the senator from Indiana that if he really desires that this right shall be given to the people, by way of referendum, he is taking some chances in allowing the bill to be pasesd in its present form."

Mr. Burton: "The senator from California has clearly stated the case as I understand it. Of course, there are cases where the legislature has the option of leaving the question to the people to be voted upon by a quasi referendum, but that is not the usual method.

Now, I again call attention to the impression which would be conveyed if we were to retain these words 'by the legislative thereof.' The bill as it passed the house last winter omitted them. The bill as it passed the house at this session included them. That is not without meaning. And under the power which Congress has to determine the time, place, and manner of holding congressional elections, I understand it could divide a state into districts. It could deputize that right, perhaps, to the governor or to an executive board, and it could give over that right to the legislature. So I regard this provision as an infringement on the rights of the states, and one which we should strike out, leaving them to their own methods and laws. * * *

I also ask that members vote against the bill if this amendment cannot be adopted. * * *"

On August 3, 1911, (page 3555) when the bill came up for a vote Senator Burton again offered the above-men-

tioned amendment to strike out the words "by the legislature thereof in the manner herein prescribed," and to insert in lieu thereof the words "in the manner provided by the laws thereof and in accordance with the rules enumerated in Section 3 of this act." The amendment was carried, yeas 39, nays 28, not voting 23, 6 of the paired members not voting stating that if the other member of their pair were present they would vote yea, and only one stating that in such event he would vote nay. The bill as finally adopted of course contains Senator Burton's amendment.

This issue was also squarely raised in the house as will be found on consulting the Congressional Record of the Sixty-second Congress, Vol. 47, Part 1, page 673 et seq.

Mr. Crumpacker, directing his remarks to Section 4 of the bill, said:

Mr. Crumpacker: "Now, the words 'by the legislature thereof' were not in the bill as it passed the last Congress. They were put in by the committee, but the house struck them out. They are incorporated in this bill. What is its effect? In the discussion of the campaign publicity bill some days ago, when reference was made to the question of primary elections and things of that kind, gentlemen on the other side said, 'Leave those questions to the states.' I think under the act of 1901 this clause was in the bill. Up to that time there had been no other method established by any state in the Union for the redistricting, except by the legislature thereof. Since then a number of reforms have been accomplished; a number of states in the Union have established the institution of initiative and referendum. Some states are so equipped with the law-making machinery that they can legislate; they can redistrict their territory for congressional purposes without the aid or assistance of the legislature. Voters may initiate propositions, and they may refer them to the people. This provision, if it has any effect at all, will prevent those states from exercising that great function of redistricting their

states for congressional purpoes by the initiative and referendum altogether. * * * * *

(Near top page 674.)

Representatives of states that have the initiative and referendum, are you willing to say that the people of your states may have the final determination of all legislation excepting the creation of congressional districts, a class of legislation that is more liable to be biased by party advantage than any other legislation? I stand here, Mr. Chairman, in this respect as the champion of the referendum, in the states that have established that institution * * should not the people of those states have the right to pass upon those acts of the legislature."

At page 702 Mr. Bartholdt said:

Mr. Bartholdt: " * * Our proposition is, and the reason for this amendment is, not to tie the hands of the people of Missouri. The Democratic legislature which 10 years ago did the redistricting made districts varying in population by more than 100,000 people; in other words, it violated the federal statute which said that the districts should contain as nearly as practicable an equal number of inhabitants. And because of this flagrant violation of a federal law, and for the further reason that the people desire to take this case in their own hands, we ask you Democrats now to be true to your traditions and to your principles and stand up for state rights on this question and not tie the hands of the people of Missouri if they propose by petition to present to the voters of that state a fair and equitable apportionment scheme. By voting these words into the bill, namely, 'by the legislature thereof,' you will prevent the people of Missouri from doing so. You will tie their hands; you will leave to the legislature again an opportunity to violate the federal statute without any recourse on our part anywhere, either in the state courts or the Supreme Court of the United States. We ask you to be true to the doctrine which you preach, that the people have a right to make use of the initiative and referendum when they cease to have confidence in the legis-

lature, and legislatures are usually controlled, as we all know, by partisan majorities, and it is probably true that both parties are sinning in that respect."

While we have made rather liberal quotation from the Congressional Record, we have by no means attempted to quote all upon this subject. We think we have quoted sufficient, however, to show clearly that the purpose of the amendment was to remove any question about redistricting bills being subject the referendum of the various states.

IS THE QUESTION PRESENTED IN THIS CASE A JUSTICIABLE ONE?

While in the case of McPherson v. Blacker, 146 U. S., page 1, which was a case arising under Clause 2 of Section 1 of Article II of the Federal Constitution relative to the appointment, in such manner as the legislature might direct, of presidential electors, Chief Justice Fuller said:

> "The question of the validity of this act as presented to us by this record is a judicial question and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state as revised by our own,"

the trend of judicial decisions seems to be to treat all such matters as the one at bar as political rather than justiciable, and we should not lose sight of the fact that Section 5 of Article I of the Federal Constitution provides:

> "Each house shall be the judge of the elections, returns and qualifications of its own members * * *"

In the case of Richardson v. McChesney, 128 Ky., 363, (108 S. W., 322) the syllabus is as follows:

1. "A legislative apportionment of the state into congressional districts cannot be judicially reviewed in the absence of a constitutional provision controlling apportionment.

2. "The constitution of the United States contains no direction to the state on the matter of apportionment of the state into congressional districts.

3. "There is nothing in the state constitution as to the manner of the apportionment of the state into congressional ditricts."

This case was taken to the Supreme Court of the United States and is found in 218 U. S., 487. It was dismissed by the Supreme Court of the United States upon the ground that the questions therein had become moot.

In the case of Pacific States Telephone and Telegraph Company v. Oregon, 223 U. S., 118, it was held:

"Whether the adoption of provisions for the initiative and referendum in the constitution of a state, such as those adopted in Oregon in 1902, so alter the form of government of the state as to make it no longer republican within the meaning of Section 4 of Article IV of the Constitution, is a purely political question over which this court has no jurisdiction.

The enforcement of the provision in Section 4 of Article IV of the Constitution, that the United States shall guarantee to every state a republican form of government, is of a political character and exclusively committed to Congress, and as such is beyond the jurisdiction of the courts."

SUMMARY.

Summing up then it is our contention that in the absence of regulation by Congress: The time, place and manner of holding elections for representatives shall be provided in each state by **law**; and that such laws are to be enacted in the same manner as other state laws. Further, we repectfully submit that the Ohio act in question was enacted under and by virtue of the act of Congress of August 8, 1911, which latter act had been amended purposely and by apt language to make action thereunder subject the referendum provisions of the various states; that said act of August 8, 1911, permitted such redistricting to be done only by the passage of a **law**; that according to Article II of the Contitution of Ohio such an act could not become a law without being subject to the referendum provided for in said Article II of the Constitution of Ohio.

We question whether a justiciable issue has been raised in this case.

Repectfully submitted,

EDWARD C. TURNER,
Attorney General of Ohio,
Attorney for Defendants.

Supreme Court of the United States

October Term, 1915.

No. 982.

THE STATE OF OHIO ON RELATION OF DAVID DAVIS,

Plaintiff in Error,

vs.

CHARLES G. HILDEBRANT, SECRETARY OF STATE OF OHIO, STATE SUPERVISOR AND INSPECTOR OF ELECTIONS, AND STATE SUPERVISOR OF ELECTIONS, ET AL.

In Error to the Supreme Court of the State of Ohio.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

EDMOND H. MOORE,
TIMOTHY S. HOGAN,
Attorneys for Defendants.

INDEX.

IN THE

Supreme Court of the United States

October Term 1915.

No. 987.

THE STATE OF OHIO ON RELATION OF DAVID DAVIS,

Plaintiff in Error,

vs.

CHARLES Q. HILDEBRANT, SECRETARY OF STATE OF OHIO, STATE SUPERVISOR AND INSPECTOR OF ELECTIONS AND STATE SUPERVISOR OF ELECTIONS, ET AL.

BRIEF OF COUNSEL FOR DEFENDANTS.

STATEMENT OF THE CASE.

This case is stated on behalf of the defendants in the brief of Honorable Edward C. Turner, Attorney General of the State of Ohio; and likewise the constitutional provisions involved are therein stated, and the federal statutes involved are therein cited.

The claim of the Plaintiff.

The plaintiff claims that by virtue of Section 4 of Article I of the Constitution of the United States the people of the State of Ohio are without authority to

negative by means of the referendum an act of the General Assembly of the State, prescribing the manner of holding elections for members of the House of Representatives. Said Section 4 of Article I of the Constitution of the United States is as follows:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the Places of choosing Senators."

The claim is made that the action of the people in invoking the referendum to negative the congressional redistricting bill does violence to the first clause of said Section 4.

Meaning of "legislature of the State" as used in Section 4 of Article I; First clause of Section 4 of Article I a surrender of power to the State; Story on the Constitution, Volume I, Section 815.

The plaintiff relies upon the contention that by the Legislature of a State is meant only what was understood up to the advent of the Initiative and Referendum as a law-making body composed of men elected by the people for the purpose of giving expression to the sovereign will in so far as the making of laws was concerned; in short, that the Legislature of Ohio would mean the General Assembly within the meaning of that term prior to the adoption of the new Constitution of the State in the year 1912. In our view, the phrase,

"legislature of the State" as used in Section 4 of Article I of the Federal Constitution means the law-making power of the State. In the first place, it will be kept in mind that the Federal Constitution no where seeks to interfere with the States with respect to the distribution of legislative powers in the State. Not a line can be found in the Federal instrument interfering with the full power of the State to distribute the legislative powers as it may see fit. The Legislature of a State may consist of one house, two houses or any number of houses which the people of the State determine upon. When Section 4 of Article I of the Constitution of the United States was adopted, there was no contention over the question of how to get the expression of the State with reference to the election of Representatives. The legislature, that is, a body composed of a limited number of men, represented the supreme will of the State and its sovereign power, and in leaving the question to the legislature of a State it was leaving the question to the State itself. This Section attracted little attention in the convention. It was assailed by the opponents of the Constitution both in and out of the State conventions with uncommon zeal and virulence. The objection was not to that part of the clause which vests in the State legislatures the power of prescribing the Times, Places and Manner of holding elections; for, so far it was a surrender of power to the State government. But it was to the superintending power of Congress to make or alter such regulations. It was said that such a superintending power would be dangerous to the liberties of the people and to the just exercise of

their privileges in elections. (Story on the Constitution, Volume I, Section 815.)

First clause of Section 4 of Article I a concession to the States.

It thus appears that Section 4 was a concession to the States. The contest in the several States in their state conventions was whether the Federal government should be left with a superintending power over the election of Representatives. The contest was over the second clause of Section 4, and not the first clause. If those who violently assailed Section 4 of Article I of the Constitution had in mind that the phrase, "legislature of the State", involved any limitation upon the State beyond the law-making power, the sovereign power, so far as a State agency was concerned, it is reasonable to assume that such limitation would be assailed. If it was understood that the expression, "legislature of the State", had a restricted meaning, it is strange that the opponents of the Constitution in the various State conventions did not make some question in regard thereto.

The federal government does not determine the composition of the state legislature.

The contention of the plaintiff, if carried out, would be that the Federal government by virtue of Section 4 of Article I of the Constitution would have the right to determine for the State what its legislature is. It is not the policy of the Federal government in the plan of its constitution to restrict the people of a State in the exercise of their wish to restrain the legislative power. We

quote from Story on the Constitution, Volume I, Sections 532 and 533.

Section 532 is as follows:

"De Lolme has said with great emphasis: 'It is, without doubt, absolutely necessary for securing the constitution of a state, to restrain the executive power; but it is still more necessary to restrain the legislative. What the former can only do by successive steps, (I mean, subvert the laws) and through a longer, or a shorter train of enterprises, the latter does in a moment. As its bare will can give being to the laws, so its bare will can also annihilate them; and if I be permitted the expression, the legislative power can change the constitution, as God created the light. In order, therefore, to insure stability to the constitution of a state, it is indispensably necessary to restrain the legislative authority. But, here, we must observe a difference between the legislative and executive powers. The latter may be confined, and is even more easily so when undivided. The legislative, on the contrary, in order to its being restrained, should absolutely be *divided*'."

Section 533 is as follows:

"The truth is, that the legislative power is the great and overruling power in every free government. It has been remarked with equal force and sagacity, that the legislative power is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. The founders of our republics, wise as they were, under the influence and dread of the royal prerogative, which

was pressing upon them, never for a moment seem to have turned their eyes from the immediate danger to liberty from that source, combined as it was with an hereditary authority and an hereditary peerage to support it. They seem never to have recollected the danger from legislative usurpation, which, by ultimately assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations. The representatives of the people will watch with jealousy every enroachment of the executive magistrate, for it trenches upon their own authority. But who shall watch the encroachment of these representatives themselves? Will they be as jealous of the exercise of power by themselves as others? In a representative republic, where the executive magistracy is carefully limited, both in the extent and duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength,—which is sufficiently numerous to feel all the passions which actuate the multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes,—it is easy to see that the tendency to the usurpation of power is, if not constant, at least probable; *and that is against the enterprising ambition of this department that the people may well indulge all their jealousy, and exhaust all their precautions.*"

The action of the people of Ohio in the adoption of the initiative and referendum principle in their constitution is recognized in the principle of that which

Justice Story calls attention to, to-wit: the necessity for a restraint upon "the legislature," using the phrase in its restricted sense. The Federal constitution vitally recognizes the principle and necessity of checks in government. The reservation by the people of the state of part of the legislative power is the establishment of a third house. It is the very essence of a republican form of government that there should be checks in the making of laws.

The case of McPherson vs. Blacker, 146 U. S., Page 1, really supports the contention of the defendants.

The case of McPherson vs. Blacker, 146 United States, page 1, which is relied upon by the plaintiff, is authority in support of the contention of the defendant. We quote from the opinion of Mr. Chief Justice Fuller:

> "A State, in the ordinary sense of the Constitution," said Chief Justice Chase, Texas v. White, 74 U. S. 7 Wall. 700, 721 (19:227, 236), "is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."
>
> "The State does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority except as limited by the constitution of the State, and the sovereignty of the people is exercised through their representatives in the legislature, *unless by the*

fundamental law power is elsewhere reposed. The Constitution of the United States frequently refers to the State as a political community, and also in terms to the people of the several States and the citizens of each State. What is forbidden or required to be done by a State is forbidden or required of the legislative power under state constitutions as they exist. The clause under consideration does not read that the people or the citizens shall appoint, but that "each State shall;" *and if the words "in such manner as the legislature thereof may direct" had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard."*

If the governor have a qualified negative on the acts of the legislature, surely the whole electorate have — Story on the Constitution, Section 527.

It is apparent that the Chief Justice regards the legislature of a State and the State as one, that is, when the legislature represents the supreme law-making power of the state. It is certainly not to be assumed that the legislature in prescribing the manner of holding elections in each state is doing other than making a law. In "prescribing" it is certainly exercising a legislative power. We quote again from Mr. Justice Story in his great work on the Constitution, Section 527, Volume I:

> "Thus, the governor of Massachusetts exercises a part of the legislative power, possessing a qualified negative upon all laws."

In the same section Mr. Story says:

> "Thus, until the late revision, the Constitution of New York constituted the governor, the chancellor and the judges of the supreme court, or any two of them with the governor, a council of revision which possessed a qualified negative upon all laws passed by the senate and house of representatives."

If a governor possessing a *qualified* negative upon all laws exercises a part of the legislative power, surely it cannot be successfully maintained that the whole electorate possessing, under the constitution, an *absolute* negative does not in using such negative exercise a part of the same legislative power.

The lower house represents the whole people.

Can it be said that in a matter so vital as that of the election of members of the national House of Representatives the people of the State may not have their will executed? The lower house represents the people as distinct from the state. By what token may it be claimed that the people of a State with full power to direct and control the General Assembly may not prescribe the manner of electing their own representatives when the very object of the creation of the lower house of the national legislature was to create a vital department of a national government as distinguished from a confederacy for the purpose of cementing the people direct to that national government and making them vitally interested in its welfare? So narrow a construction upon the expression, "legislature of the State"

would not be placed by the most rabid opponent of a national government as distinguished from a confederacy in the days of the strictest construction.

Fundamental error of the plaintiff.

Counsel for plaintiff, on page 16 of their brief, say:

> "The reservation (Section I, Article II) to the people of the state to reject laws passed by the legislature, can not be held to reserve to them rights they never had;"

Herein is the fundamental error of the plaintiff, an error which got him on the wrong track, and he continues to remain on that track. As said by Mr. Chief Justice Story, Section 815, Volume I, Story on the Constitution, the clause which vests in the state legislatures the power of prescribing the times, places and manner of holding elections was a surrender of power to the state government. It was part of the plan of government submitted to the states for acceptation that the states should have that power, and so far as the first clause of Section 4 of Article I of the Constitution is concerned, the Federal government surrendered everything to the state and reserved nothing to itself. Its sole reservation is in the second clause of said section.

Counsel for the plaintiff in their brief, on page 17, say:

> "Strictly speaking the prescribing required by Section 4, Article I Constitution of the United States, is not a law in the ordinary sense; especially not a law of the state; it is the discharge of a

> delegated federal duty or power, often called a Federal act, the same as if passed by Congress under the same provision of the Constitution of the United States. In the absence of that provision neither the legislature nor the people of the state would have any authority in the premises."

Herein is to be found the same fundamental error as the one just referred to which misled the plaintiff. The claim of the plaintiff as contained in the quotation leaves out of view the proposition that the first clause of Section 4 of Article I of the federal constitution left the federal government nothing to delegate. The full right of controlling elections is left entirely to the state, and the whole of the reservation to the federal government is, as stated before, in the second clause.

"Prescribing" is making a law; The Act of Congress of February 7, 1891.

In response to the claim of the plaintiff that the *prescribing* required by Section 4 of Article I of the Constitution of the United States is not a law in the ordinary sense, permit us to quote the following language from the act of Congress of February 7, 1891, (26 Statutes at Large, 735):

> "And other representatives by districts now prescribed by *law* until the legislature of such state in the manner herein prescribed shall redistrict such state."

It thus appears that the Congress referred to the result of the legislature in *prescribing* as a *law*.

No amendment to the Constitution of the United States required to authorize a referendum on a redistricting bill; Section 2 and Section 3 of Article I of the Constitution of the United States quoted.

The answer to the contention of the plaintiff that it required an amendment of the constitution of the United States to authorize the election of United States Senators by popular vote of the people of the State, and that, therefore, an amendment to the Federal constitution would be required to authorize the prescribing of the times, places and manner of holding elections for Representatives except by a legislative body consisting of a limited number of representatives is obvious upon a comparison of Section 2 and Section 3 of Article I of the Constitution of the United States.

Section 2 provides:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states."

Section 3 provides:

> "The Senate of the United States shall be composed of two Senators from each state, *chosen by the Legislature thereof,* for six years;"

The House of Representatives represents the people. The Senate represents the State.

The legislature in "prescribing the times, places and manner of holding elections for Representatives" is acting for the people, and its prescribing is a law-making power, and is to be exercised in the same man-

ner in which other laws are enacted. The legislature in "choosing Senators" acted as a body of electors exercising a power prescribed by the constitution, and not as a law-making body at all, as Mr. Justice Story observes. In exercising this power the two branches of the legislature (where the legislature was bi-cameral) generally acted concurrently and not in the manner in which such legislature acted in the enactment of laws.

Relying upon the fundamental idea that the power it left to the state through its law-making body, we have deemed it unnecessary to trouble the court with the citation of numerous decisions.

The Act of Congress (August 8, 1911) is also determinative of the question; Section 4 of the Act of Congress of August 8, 1911, quoted.

Independent of the construction to be placed upon the term "Legislature" as used in Art. I, Sec. 4 of the Federal Constitution, Congress by Section 4 of the act of August 8, 1911, providing for the present apportionment of Representatives, has determined the manner in which any re-districting must be made. This section reads as follows:

> "Sec. 4. [*Re-districting States — Representatives At-Large.*] That in case of an increase in number of Representatives in any state under this apportionment, such additional Representative or Representatives shall be elected by the state at large and the other representatives by the disricts now prescribed by law until such state *shall be re-districted in the manner provided by the laws*

thereof and in accordance with the rules enumerated in Section 3 of this act; and if there be no change in the number from a state, the Representatives thereof shall be elected from the districts now prescribed by law until such state shall be re-districted as herein prescribed."

Section 4, with the exception of the words which are above italicized: "Shall be re-districted in the manner provided by the laws thereof," is a replica of Section 4 of the apportionment act of 1901. The last named act, and the other apportionment acts for more than half a century before, contain, in lieu of the phrase quoted, the words, "By the Legislature thereof in the manner herein prescribed."

From an inspection of these acts, it is apparent that the change was advisedly made and the inference is at once raised that the changed language was adopted in view of the fact that the referendum had become a part of the constitution of many of the states.

Remarks of Senator Burton in United States Senate.

We need not, however, rest on inference. The section of the apportionment act above quoted, as it originally passed the House, contained the language of the former acts: "By the Legislature thereof."

When the bill came to the Senate, Senator Burton of Ohio (see Congressional Record, vol. 47, p. 3436) moved to amend the bill by striking out the words "By the Legislature thereof in the manner herein prescribed" and inserting, in lieu thereof, the words "In the man-

ner provided by the laws thereof, and in accordance with the rules enumerated in Section 3 of this act." In this connection, Mr. Burton said:

"This amendment pertains to the dividing of the several states into districts and to the manner in which this shall be done. * * * Section four provides that representatives shall be elected from the districts now prescribed by law until such state shall be re-districted by the Legislatures thereof in a manner herein prescribed. 'The manner herein prescribed' means that the districts shall be composed of contiguous and compact territory and contain as nearly as practicable an even number of inhabitants as expressed in the prior section." * * *

* * * "Mr. President, whatever our views may be on the subject of the initiative or referendum we cannot ignore the existence of statutes in divers States of the Union under which they are the recognized methods of enacting laws. Under such circumstances what is the effect of this expression, 'by the legislature thereof'? It is a distinct and unequivocal condemnation of any legislation by referendum or by initiative. It is a mandate to the States to this intent: 'Whatever your laws may be for the enactment of statutes, yet in the division of the State into congressional districts, you must act by the legislature alone. Even if under the laws a trivial question can be submitted to the whole electorate, nevertheless in this very important matter of dividing the State into districts the legislature alone shall have full authority.'" * * *

"A due respect to the rights, to the established methods, and to the laws of the respective States requires us to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes." * * *

"I call attention to the exceptional importance of a districting law. Mr. President, we all know there have been most unjust—yes, I may say, shameful, —instances of gerrymanders in some of the States." * * * "If there is anything which is clearly a distinct denial of the rights of popular government it is a gerrymander."

Here he was interrupted by Senator Shively, and a long colloquy resulted, after which Senator Burton resumed: (p. 3437)

* * * "If you have a referendum in a State the object of which is to submit to the people at large the question of whether or no a statute shall stand, the question whether it is just or unjust, that provision ought especially to apply to a law dividing a State into districts, where there is such an opportunity for monstrous injustice. *If there is any case in the whole list of laws where you should apply your referendum, it is to a districting bill.*"

"* * * *This*" (referring to amendment) "*gives to each State full authority to employ in the creation of congressional districts its own laws and regulations.*"

Mr. Burton discussed the matter at great length the following day (vol. 47, p. 3507), having this to say of infamous gerrymanders of the character of the one

now sought to be saved from the wrath of an outraged electorate:

> "As I said yesterday, there is nothing that strikes so nearly to the root of the whole system of popular government as a gerrymander. It overturns the great principle that the majority may rule, and substitutes the rule of the minority. The gerrymander gives sanction to trickery, to fraud, and to dishonesty. It gives a reward to the unscrupulous, and power to those who gain it by robbery, so that you can say of the party or the individual who accomplishes a gerrymander what Hamlet said of his uncle:
>
> 'A cutpurse of the empire and the rule,
> That from a shelf the precious diadem stole,
> And put it in his pocket.'
>
> "* * * What right have we, Mr. President, in the face of different methods and laws pertaining to the enactment of legislation—some State acting by the legislature, others acting by the legislature but subject to a referendum—to fix one inflexible way and require that every State shall be divided into congressional districts in that manner?"

Attitude of other Senators.

Other Senators then participated in the debate. Those who opposed the amendment did not undertake to contend that a re-districting law should not as a matter of right, be subject to the referendum, but maintained that the amendment was unnecessary to produce this result, and that, even without it, any re-districting

law passed by the Legislature would be subject to the referendum in states whose constitution embodied that principle. The amendment was ultimately adopted by the Senate and concurred in by the House.

It is therefore apparent, not only that the changed language was advisedly used, but that it was adopted with the express purpose and intent that, in States such as Ohio whose constitutions contained a provision subjecting all laws to the operation of the Referendum, the people might have the right to invoke a Referendum to defeat an outrageous gerrymander.

In the passage of the Act of 1911 Congress was exercising a "superintending power".

In the passage of the act in question Congress was exercising the "superintending power" vested in it by the last clause of Section 4, of Article I of the Federal Constitution.

Counsel for plaintiff contend that this power was improperly or at least imperfectly exercised, because under the language of the act, Congress does not assume to itself the entire power to determine the manner in which representatives are to be selected. They cite ex parte Siebold, 100 U. S. 371, in support of their contention. We are unable to see how they extract comfort from that case. Paragraph 8 of the syllabus to which they refer is as follows:

> "In making regulations for the election of Representatives, it is not necessary that Congress should assume entire and exclusive control thereof. By virtue of that clause of the Constitution which

declares that "the times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing Senators," Congress has a supervisory power over the subject and may either make entirely new regulations, or add to, or alter or modify the regulations made by the State."

In this connection we cite the court also to page 383 of the opinion.

Congress did not undertake to direct the legislatures of the States.

Counsel also contend that in the passage of the apportionment act Congress undertook to direct the legislatures of the States as to the manner in which the power of re-districting should be exercised, and that Congress had no power so to do. The language of the act itself is a sufficient answer to this contention. Without undertaking to determine the manner in which any re-districting law should be passed, the act provides merely that the state "shall be re-districted in the manner provided by the laws thereof."

But over and beyond all this Congress assuredly had the ultimate power, if it saw fit to exercise it, to determine how future representatives should be selected from any State for all time until a future Congress should change such method by legislative enactment. That it did not undertake to exercise this arbitrary power does not detract from the validity of the act.

The act does provide that the additional representatives provided for by the apportionment shall be elected at large and the other representatives by the districts now prescribed by law. Congress had the full power to stop there had it seen fit. By the further language of the act it does not undertake to say to any state that it shall ever redistrict such state. It merely does say (what it has the unquestioned power to say) that until such state is re-districted "in the manner prescribed by the laws thereof," representatives shall still continue to be elected at large and from the districts then existing. It was up to the respective state to determine whether or not it saw fit to re-district the state at all. Under the limitation prescribed by the act, however, if it did re-district it must take this action in the manner prescribed by its laws.

Respectfully submitted,

EDMOND H. MOORE,
TIMOTHY S. HOGAN,
Of Counsel for the Defendants.